

THE LAW
OF
MORTGAGE
AND
OTHER SECURITIES UPON PROPERTY.

BY
WILLIAM RICHARD FISHER,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

Third Edition.

~~IN~~ TWO VOLUMES.

VOL. I.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.

MEREDITH, RAY & LITTLE, MANCHESTER.
T. & T. CLARK AND BELL & BRADFUTE, EDINBURGH.
SMITH & SON, GLASGOW. HODGES, FOSTER & CO., GRAFTON STREET, DUBLIN.
THACKER, SPINK & CO., CALCUTTA. THACKER, VINING & CO., BOMBAY.
GEORGE ROBERTSON, MELBOURNE.

1876.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, HIGH HOLBORN.

PREFACE.

THE object of the Author has been to explain in this Work the nature of the different kinds of securities, the rights and equities which they create, and the manner of and circumstances attending their discharge. He has met with many difficulties in the arrangement and working out of the subject; for none of the several kinds of securities involve precisely the same rights and remedies; while from their diversity of origin, their separate and gradual adaptation to the convenience of borrowers and lenders and the exigencies of commerce, and from the nature of the different kinds of property which they affect, they probably embrace a greater variety of learning than any other single branch of the English law.

Considering the extent of the law of securities, the number of the sources from which it is drawn, and that it has grown up under jurisdictions proceeding upon different principles, there is more harmony in the general results than might have been expected. The greatest difficulties occur in the law relating to Priority, and arise partly from the passing of numerous statutes with little or no regard to their effect upon one another, and partly from the exceptions and refinements which

have been grafted upon the rules relating to the doctrines of Fraud and Notice, and to the Tacking and Consolidation of securities.

The provision of the Vendor and Purchaser Act, 1874 (repealed in the following year), that no priority or protection should be given or allowed to any estate, right or interest in land by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land, notwithstanding the rights of purchasers for valuable consideration, and without notice, was perhaps aimed at the law of consolidation as well as of tacking, as it is otherwise difficult to account for the expression "legal or other estate or interest." It was, however, inapplicable to the consolidation of securities, which is a right to protect an interest in an estate, not by another interest in the same estate, but by an interest in another estate; and so long as the distinction between legal and equitable estates is to prevail, the enactment was wider than was necessary or proper for the mere purpose of amending the law of Tacking.

It is submitted that the proper mode of amending the law of Priority is by taking the rule of equity, *Qui prior est tempore potior est jure*, as the basis of the law, and by laying down the several exceptions to it; any attempt to deal with detached portions of the subject, by means of general enactments, is likely to meet with the fate of the late attempted alteration.

The further consideration which the Author bestowed upon the subject of securities during his employment by the Digest of Law Commissioners has enabled him

to make several improvements in the present Work ; some of the earlier parts of which have been recast, and now appear nearly in the language and arrangement used in the completed part of the intended “ Digest of the Law of Mortgage and Lien ;” though to save space, and to avoid discrepancy in form between these and other parts of the book, many of the concise propositions of law, which were considered proper for a work designed as a foundation for, and written in the form of a code, have been united into longer paragraphs. The parts of the first and second chapters, which relate to Equitable Mortgages, Pledges, Hypothecations and Possessory Liens, have, in particular, been thus dealt with.

Besides the many new statutes and decisions relating to the subject, the Author has added a great number of references to contemporary reports not formerly cited ; and has done his best to correct the errors of the last edition : for pointing out several of which, and for other useful suggestions, he has to thank many of his professional friends.

9, OLD SQUARE, LINCOLN'S INN,
October, 1876.

CONTENTS.

VOLUME I.

INTRODUCTION.

CHAPTER I.

OF SECURITIES BY CONTRACT.

PART 1. Securities by Contract. 1—Of the several kinds of Securities upon Property and their Incidents. 10—Legal Mortgages of Real and Chattel Real Estate. 22—Mortgages of Chattels Personal. 33—Equitable Mortgages. 45—The Registration of Mortgages and Bills of Sale. 69—Mortgages of Ships.

PART 2. 80—Pledges or Pawns.

PART 3. 105—Hypothecations. 106—Ordinary Hypothecations. 117—Maritime Hypothecations.

CHAPTER II.

OF LIENS.

PART 1. 149—Liens—Non-possessory Liens. (A) 151—Judicial Liens. 167—Charging Orders. 172—Orders for Payment of Money. 180—The Registration of Judgments. (B) Equitable Liens. 193—The Lien upon Land for Purchase-money. 197—Partnership Liens. 204—Agency Liens. 205—Liens for Expenditure upon the Property of another; and herein of Salvage Liens, and Liens upon West India Estates. 214—The Liens of Trustees for Expenditure and for the Security of Property subject to Trusts. 223—The Liens of Solicitors upon the Fruits of Judgments and Decrees. 235—Maritime Liens.

PART 2. Possessory Liens. 252—Nature of General and Specific Liens. 268—The Lien of the Vendor of Chattels. 271—Liens for Supplies or Services under legal Obligations. 289—Liens for Labour upon Chattels. 315—Liens for Debts incurred in the course of Trade.

VOLUME II.

CHAPTER VII.

OF THE PRIORITIES OF INCUMBRANCERS.

- PART 1. Legal Priority and herein of defective Assurances and the Doctrine of Tacking. 981—Priority under defective Assurances. 992—The Effect of the Legal Estate and the Tacking of Securities.
- PART 2. Equitable Priority. 1018—The General Rules of Equitable Priority. 1033—The Right to consolidate several Securities.
- PART 3. Priority under Securities upon Chattels Personal and Choses in Action, and upon Ships under the Maritime Law. 1047—Priority in Securities upon Chattels Personal and Choses in Action. 1060—Priority under the Maritime Law.
- PART 4. Priority by Statute. 1066—Under the Land Registration Acts; 1077—Under the Ship Registry Acts; 1082—Under the Judgment Acts; 1105—Under the Bankruptcy and other Acts.

CHAPTER VIII.

OF THE LIABILITY OF THE INCUMBERED ESTATE TO THE PAYMENT OF THE DEBT.

- 1112—Cases in which the incumbered Estate is primarily liable to, or entitled to be exonerated from, the Debt. 1141—Cases in which two or more Estates are liable to contribute to the Debt. 1149—Cases in which incumbered and other Estates will be marshalled.

CHAPTER IX.

OF THE DISCHARGE OF THE SECURITY.

- PART 1. Of Redemption. 1164—The Nature and Manner of exercising the Right of Redemption. 1177—The Defences to the Claim to redeem. 1186—The Time for Redemption. 1208—Persons entitled to redeem. 1222—The Wife and Surety. 1225—Joint Tenants, &c. 1227—Tenants in Tail and for Life and Remaindermen. 1234—Guardians and Committees. 1236—In Cases of Forfeiture and Escheat. 1238—Assignees. 1243—Judgment and other Creditors. 1249—Trustees in Bankruptcy. 1250—Devisees. 1251—Real and Personal Representatives. 1264—Members of Benefit Building Societies. 1272—Payment or Satisfaction of the Debt.
- PART 2. 1293—Release of the Debt or Security.

- PART 3. Merger and Waiver. 1299**—Merger of the Debt. **1328**—Merger of the Security. **1335**—Waiver, and herein of the Destruction of Possessory Liens by Abandonment of Possession, and **1371**—The Right of the Vendor of Chattels to stop them in Transitu. **1408**—Loss of the Benefit of the Security by Negligence and Fraud. **1425**—Loss or Destruction of the subject of the Security.
-

CHAPTER X.

OF THE PERSONS INTERESTED IN AND WHO ARE NECESSARY OR PROPER PARTIES TO SUITS CONCERNING SECURITIES.

- The Persons interested in the Equity of Redemption. **1428**—The Mortgagor. **1433**—The Trustee in Bankruptcy of the Mortgagor. **1434**—The Assignees of the Equity of Redemption. **1443**—The Devisee and Heir of the Mortgagor. **1446**—The Personal Representative of the Mortgagor. The Persons interested in the Security and Debt. **1455**—The Mortgagee. **1462**—The Assignees and Devisees of the Security and Debt. **1465**—The Heir of the Mortgagee. **1466**—The Personal Representative of the Mortgagee. **1467**—The Persons beneficially interested, either in the Equity of Redemption or in the Security and Debt. **1476**—Assignees pendente lite of the Mortgagor and Mortgagee.
-

CHAPTER XI.

OF TAKING THE ACCOUNTS.

- PART 1. Accounts generally between the Mortgagor and Mortgagee. 1481**—Who is bound by Accounts. **1486**—Accounts against the Mortgagor and of the Rents and Profits. **1496**—Accounts against the Mortgagee and his Assignees. **1503**—Accounts against the Mortgagee in Possession. **1524**—The Manner of Charging the Mortgagee in Possession and Allowances to the Mortgagee. **1540**—Taking the Account with Rests. **1548**—Carrying on the Accounts.
- PART 2. Accounts of Interest. 1549**—The Persons who are bound to pay and entitled to receive Interest. **1575**—The Conversion of Interest in Arrear into Principal. **1580**—Computing subsequent Interest. **1584**—The Right to set off Arrears of Interest. **1585**—The Right to Arrears of Interest under the Statutes of Limitations. **1592**—The Rate of Interest and Usury. **1597**—When Interest ceases.
- PART 3. Accounts of Costs. 1600**—The General Right of the Mortgagee to Costs. **1615**—The Costs under a Decree for Sale. **1618**—The Equitable Mortgagee's Right to Costs. **1626**—The Costs of the Incumbrancers under the Lands Clauses Consolidation Act. **1628**—The Mortgagee's Right to Costs and Expenses disbursed. **1640**—The Mortgagee's Liability to Costs incurred by the Loss of the Deeds. **1641**—Costs arising out of Assignments pendente lite. **1642**—The Costs of Re-conveyance. **1649**—The Right of Disclaiming Parties to Costs. **1658**—Adding Costs to the Debt after Judgment. **1660**—Solicitor's Costs. **1663**—Costs upon Staying Proceedings.

CHAPTER XII.

OF THE JUDGMENT AND OF MATTERS CONSEQUENT ON THE
DISCHARGE OF THE SECURITY.

1664—Nature and Form of the Judgment. **1684**—Time allowed for Payment. **1688**—Enlarging the Time for Payment and Opening the Foreclosure. **1707**—Re-conveyance and Delivery of Possession of the Estate and the Discharge of the Security. **1724**—Right to Policies of Insurance effected as Collateral Securities. **1732**—Judgments for Sale. **1745**—Judgments and Orders against Infants and Trustees. **1761**—Judgments against Married Women. **1762**—Delivery of the Title Deeds. **1766**—Loss of the Title Deeds. **1771**—Order absolute for Foreclosure. **1779**—Dismissal of the Suit for Redemption.

APPENDIX.

JUDGMENTS:—**1783**—*Barnes v. Racster*. **1784**—*Thackwray v. Bell*. **1792**—*Bell v. Cartwright*. **1793**—*Hill v. Edmonds*. **1794**—*Sober v. Kemp*. **1795**—*Hughes v. Williams*. **1796**—*Chappell v. Rees*. **1797**—*Aldworth v. Robinson*. Of Securities under various Statutes. **1798**—Securities upon Ecclesiastical Benefices. **1802**—Charitable Trusts Acts. **1803**—Commissioners' Clauses Act, 1847. **1804**—Companies Acts. **1808**—Copyhold Enfranchisement Acts. **1813**—County Courts Equitable Jurisdiction Act. **1814**—Improvement Acts. **1819**—Inclosure Acts. **1822**—Lands Clauses Consolidation Act, 1845. **1823**—Land Tax Redemption Acts. **1824**—Municipal Corporation Acts. **1825**—Public Works and Fisheries Acts. **1826**—Railway Companies Securities Act, 1866. **1830**—Of Stamps upon Securities.

AUTHORITIES CITED IN THIS WORK.

CASES	Page xiii
STATUTES	lxii
ORDERS OF COURT	lxxv
MISCELLANEOUS AUTHORITIES	lxxvii

CASES.

	PAGE		PAGE
Abbis v. Winter	ii. 672	Albert v. Grosvenor Investment Company	320
Abbott v. Rice	165	Alchin, re	305
— v. Strutton	34, 261, 393; ii. 662, 666	— v. Hopkins	472
Aberaman Ironworks v. Wickens	141	Alchorne v. Gomme	453, 454
Aberdeen v. Clitty	341, 343, 390	Aldborough v. Trye	6
— v. Newland	473	Alden v. Foster	ii. 962, 1051, 1056
Abington v. Booth	368	Alderson, Exp.	82
Ablett v. Edwards	ii. 1109	— v. White	15, ii. 735
Abney v. Wordsworth	ii. 1055	Aldred v. Constable	230
Absolum v. Gettung	ii. 677	Aldrich v. Cooper	ii. 700, 704, 705, 709, 710
Ackland v. Gravener	382	Aldridge v. Forbes	ii. 708
Ackroyd, Exp.	219	Aldworth v. Robinson	ii. 636, 1042, 1107, 1127
— v. Mitchell	302	Alen v. Hogan	ii. 689
Acraman v. Herniman	111	Alexander	85, 86, 91, 95
Acton v. Acton	16	— Exp.	38
— v. Pierce	ii. 769	— v. Brown	ii. 793
Adams, Exp.	532, 533	— v. Duke of Wellington	256
— v. Barry	ii. 743, 744	— v. Simms	63, 465; ii. 648, 1004
— v. Claxton	37, ii. 616	Aline	86, 94, 172; ii. 652
— v. Graham	51	Allan v. Backhouse	284
— v. Paynter	ii. 890, 892, 905	— v. Gripper	ii. 861
— v. Scott	489, 490	Allard v. Kimberley	ii. 687
— v. Sworder	ii. 943	Allard, Exp.	133
Addison v. Cox	ii. 641, 1000	Allen, Exp.	50, ii. 649
— v. Walker	312	— Re	276
Adkins v. Graves	517	— v. Aldridge	ii. 805
African Steamship Company v. Swanzy	174	— v. Allen	ii. 697
Agar v. Athenæum Life Assurance Company	264	— v. Anthony	573
Aggas v. Pickerell	ii. 748	— v. Bonnett	233
Agra Bank v. Barry	ii. 620, 655, 656	— v. De Lisle	ii. 830, 831
Aguilar v. Aguilar	ii. 682, 685	— v. Knight	ii. 606, 622, 875, 877, 914, 1017
Aina	ii. 881	— v. Papworth	ii. 921
Ainslie v. Harcourt	284	— v. Smith	181, 187; ii. 789
Ainsworth, Exp.	526	— v. Thompson	51
— v. Roe	ii. 1015	— v. Williams	472
Aitkin, In re	212	Allenby v. Dalton	14
Akerman v. Humphery	ii. 855	Alletson v. Chichester	539, 559
Albert Crosby	483	Allfrey v. Allfrey	ii. 923
Albert Life Assurance Company, re	ii. 835		

	PAGE		PAGE
Alliance Bank v. Brown	2	Ariadne	92
Allison, Re.	536	Arkwright, Exp. .. 35, 40, 539,	560
Allsop v. Day	53	Armadillo	98
Alsager, Exp.	ii. 632	Armstrong v. Armstrong ..	288
— v. St. Katharine Dock Com-		— v. Storer	ii. 826, 1009
pany	191	Arnell v. Bean	229
— v. Spalding	253	Arnold v. Bainbridge	322
Alston, Exp.	ii. 708	— v. Garner	ii. 954
— v. Parker	ii. 1006	— v. Mayor of Gravesend ..	399
Alton v. Harrison	232	Arteza v. Smallpiece	ii. 840
Amalia	173	Arthur v. Higgs	ii. 1063
Ames v. Hill	ii. 1172	Arthurs v. Arthur	402
— v. Mannering	360	Ascongh v. Johnson	ii. 930
— v. Trustees of Birkenhead		Ashby v. Ashby	270
Docks 398, 415; ii. 662,	666	Ashenhurst v. James	ii. 980, 981
Amesbury v. Brown	ii. 969	Ashley, Exp.	ii. 1082
Amhurst v. Dawling	331	Ashmole v. Wainwright ..	460, ii. 789
— v. Litton	ii. 771	Ashton v. Blackshaw	53
Amis v. Lloyd	341	— v. Corrigan	2
Ancaster v. Mayer .. 5, ii. 679,	692, 695	— v. Dalton	38, ii. 964
Anderson, Exp.	ii. 1012	— v. Milne	ii. 735, 736
— v. Anderson	ii. 1083	Ashwell v. Staunton	ii. 964, 996
— v. Guichard	378	Ashwell's will, Re.	359, ii. 989
— v. Kemshend	383, 404	Ashworth v. Mounsey	494
— v. Piguet	ii. 809	Aspinell v. Pickford	188, 200
— v. Radcliffe	245	Astley v. Mills	ii. 805, 813
— v. Stather	ii. 899, 910	— v. Tankerville	ii. 693
Andrew, Re	201	Aston v. Aston	ii. 968
— v. Wrigley	578	— v. Carzon	589
Andrews, Exp.	200, ii. 1074	— v. Pye	ii. 801
— Re Emmett	ii. 1074	Athenæum Society, Re	264
— v. Berry	251	Atkin v. Barwick	ii. 847
Angell v. Bryan	ii. 623, 650	Atkins, Exp.	80
— v. Draper	ii. 768	— v. Tredgold	357
— v. Smith 385, 415, 418,	420	— v. Uton	ii. 596
Anglesey's (Marquis of) Estate, Re		Atkinson v. Atkinson	ii. 978, 979
.. ..	ii. 928	— v. Maling	65, 238
Anglo-California, &c., Co., Re ..	371	— v. Smith	ii. 754
Annesley's Case	202	Atkinson's Trusts, Re	ii. 644
Anon .. 13, 163, 182, 201, 273, 315,		Atlas 9, 85, 87, 89, 92, 100	
325, 335, 362, 378, 379,		Attenborough, Re.	ii. 1176
405, 413, 414, 415, 418,		— v. Thompson	51
488, 491, 504, 563, 586;		Atterbury v. Wallis	557, 558
ii. 617, 702, 715, 724, 736,		Att.-Gen. v. Backhouse ..	564
738, 739, 742, 772, 779,		— v. Lord Carrington ..	ii. 980
789, 901, 931, 944, 949,		— v. Cox ii. 624, 824,	878
964, 980, 1020, 1051,		— v. Crofts 13, ii. 762	
1052, 1065, 1082, 1103,		— v. Day 378, 405	
1108.		— v. Gardner	ii. 726
Ansell v. Baker	ii. 822	— v. Geo	404
Anson v. Lee	ii. 748, 750	— v. Haberdashers' Com-	
Appleby v. Duke	ii. 1028, 1108	pany	437
Applegarth v. Colley	251	— v. Hall	563, 564
Arab	ii. 712	— v. Hamilton	ii. 1086
Araminta	165	— v. Hardy 329, ii. 757	
Arbuckle v. Cowtan	254	— v. Duke of Leeds	ii. 764
Arbutnot v. Norton	256	— v. Mayor of Galway ..	403
Archdeacon v. Bowes .. 384, ii. 937, 938,		— v. Pargeter	564
997, 998, 1007		— v. Pilgrim	564
Archer v. Harrison	ii. 784	— v. Sittingbourne, &c.	
— v. Hudson	243, 568	Railway Company 516,	
— v. Snatt	ii. 616	.. ..	ii. 1151
Arglasse v. Muschamp	ii. 725	— v. Truman	69
Argos Cargo, Exp.	189	— v. Vigor	420

	PAGE		PAGE
Att.-Gen. v. Whorwood ..	154	Baldwyn v. Banister ..	ii. 933
— v. Wilkins ..	587, 588	Balfe v. Lord ..	5, 11, 12; ii. 718, 735
Attwood, Exp. ..	528	Balguey v. Hamilton ..	155
Audsley v. Horn ..	ii. 884	Ball v. Ball ..	ii. 680
Augusta ..	86, 88, 90, 91, 92	— v. Harris ..	282
Austen v. Craven ..	ii. 860	— v. Margrave ..	313
— v. Dodswell's Executors ..	791, 794, 999	— v. Lord Riversdale ..	ii. 657, 741
— v. Halsey ..	140	Bampfild v. Vaughan ..	ii. 897
Austin v. Croome ..	306	Bampton v. Birchall ..	ii. 742
Australasian, &c. Company v. Morse ..	96, 101	Bannundoss Mookerjee v. Omeish Chunder Race ..	ii. 798
Australian, &c. Company v. Mounsey ..	260	Banbury's (Lord of) Case ..	563
Averall v. Wade ..	569, ii. 704, 705, 706	— v. White ..	50, 51
Avison v. Holmes ..	110, 258, 259, 470	Bandon v. Beecher ..	ii. 737
Ayers v. South Australian Banking Company ..	64	Bank of Ireland v. Perry ..	218, 219
Ayerst v. Jenkins ..	248	Bank of South Australia v. Abrahams ..	267
Ayling v. Williams ..	179	Bankhead's Trust, Re ..	85
Aynsley v. Reed ..	ii. 757, 1063, 1064	Banks v. Whittall ..	80; ii. 1002, 1025, 1062
B.		Banner v. Johnston ..	218, 531
Bacon, Exp. ..	527	Barbara ..	94
— v. Husband ..	8	Barber v. Butcher ..	371
Badcock, Exp. ..	ii. 1083	—, Exp. ..	217
Badger, Exp. ..	ii. 974, 986	Barclay, Exp. ..	54, ii. 1011
— v. Shaw ..	58	Barham v. Earl Clarendon ..	ii. 688
Badham v. Odell ..	ii. 921, 997	— v. Earl Thanet ..	ii. 687, 688
Baggett v. Meux ..	275	Baring v. Currie ..	215, 216
Baglehole, Exp. ..	527	Barker, Re ..	ii. 986
Bagnal, Exp. ..	136	— v. Kellett ..	ii. 902
Bagot v. Bagot ..	ii. 688, 691	— v. St. Quentin ..	163, 165
— v. Oughton ..	ii. 682, 683	— v. Smark ..	321, 325
Baile v. Baile ..	161, 162	Barkley v. Lord Reay ..	388, 401
Bailey, Exp. ..	232, ii. 675	Barling v. Bishopp ..	228
— v. Abraham ..	286	Barlow v. Gains ..	390, 402
— v. Birchall ..	159, 161, 162, 166	Barnard v. Hunter ..	ii. 648
— v. Fernor ..	ii. 870	— v. Young ..	ii. 983
— v. Hammond ..	ii. 775	Barned's Banking Co., Re, Forwood's Claim ..	531
— v. Richardson ..	573, 574, 575; ii. 805, 813	Barnes, Exp. ..	527, ii. 928
Bailey's Trusts, Re ..	ii. 892	— v. Fox ..	ii. 1037
Baillie v. M'Kewan ..	543, ii. 623, 873	— v. Harding ..	469
Bainbrigg v. Baddeley ..	386, 387	— v. Pondrey ..	114
— v. Blair ..	381, 435	— v. Raster ..	ii. 705, 706, 827, 828, 1000, 1008, 1065, 1112
Baine, Exp. ..	ii. 669	— v. Robinson ..	271, 272
Baines v. Swainson ..	293	— v. Thrupp ..	334
Bainham v. Manning ..	248	Barnett, Exp. ..	541, 542
Baker, Re ..	ii. 1035	— v. Apperley ..	472
— v. Bradley ..	243	— v. Weston ..	ii. 601, 611, 615, 621
— v. Gray ..	ii. 632	— v. Wilson ..	ii. 752
— v. Harris ..	ii. 615, 616	Barnewell v. Cawdor ..	ii. 700
— v. Henderson ..	202, 211	Barnhart v. Greenshields ..	573, 575
— v. St. Quentin ..	160	Barnwell v. Iremonger ..	ii. 697, 700
— v. Wind ..	ii. 1003	Barr's Trusts, Re ..	ii. 643
— v. Wetton ..	ii. 740, 743, 744, 896	Barrack v. M'Culloch ..	227
Balch v. Symes ..	183, 202, 210; ii. 838	Barrell v. Sabine ..	15
Baldock, Exp. ..	529	Barrett, Exp. ..	ii. 833
Baldwin v. Belcher ..	ii. 708	— v. Blake ..	ii. 767
— v. Cawthorne ..	14	— v. Hartley ..	241, ii. 957
— v. Lewis ..	ii. 958	— v. Wells ..	829, ii. 878
		Barron v. Lancefield ..	ii. 1034, 1066
		— v. Martin ..	ii. 738, 739, 740
		— v. Stewart ..	96

	PAGE		PAGE
Barrow v. Coles	ii. 853	Beck v. Walsh	ii. 596
— v. Griffith .. ..	.. 283	Becket v. Micklethwaite ..	ii. 1042
— v. White .. ..	.. ii. 934	Beckett v. Booth	ii. 825
Barry, Exp.	539, ii. 644	— v. Buckley	513, ii. 767
— v. Bernal .. ..	.. ii. 719	— v. Cordley 80, 569; ii.	620, 875
— v. Harding .. ..	.. ii. 688	Beckford v. Close .. ..	.. ii. 743
— v. Longmore .. ..	.. 185	— v. Kemble .. ..	.. 326
— v. Wilkinson .. ..	.. 393	— v. Wade .. ..	.. 737
— v. Wray .. ..	.. ii. 917, 1023	— v. Wildman .. ..	.. 311
Barrmore v. Ellis .. ..	.. 275	Bedford v. Backhouse ii.	607, 611, 612, 654
Bartholomew v. May ..	ii. 680, 699, 701	Beeston, Exp. .. ..	.. 316
Bartle v. Wilkin	ii. 904, 1019, 1020	Beever v. Luck .. ..	.. ii. 634, 1050
Bartlett v. Bartlett ..	.. 559, ii. 644	Begbie v. Fenwick .. ..	.. 54
— v. Franklin .. ..	.. ii. 787, 998	Belaney v. Ffrench .. ..	.. 210
— v. Rees .. ..	.. 518, ii. 1050	Belcher, Exp. .. ..	.. ii. 1084
Barton v. Boddington ..	.. ii. 853	— v. Capper .. ..	.. 190
— v. Gainer .. ..	.. 309	— v. Oldfield .. ..	.. 64, 180
— v. Rock .. ..	.. 378	Belchier v. Butler .. ..	.. ii. 614, 1008
— v. Van Heythuysen ..	228, 234	— v. Renforth .. ..	.. ii. 600
— v. Williams .. ..	.. 67	Belding v. Read .. ..	.. 26
Bartram v. Farbrother ..	.. ii. 847	Beldon v. Campbell .. ..	.. 90
Barwell v. Parker .. ..	.. ii. 964, 966	Bell, Exp. .. ..	.. 81
Barwick v. Rende .. ..	.. 254	— v. Ahearne .. ..	.. ii. 1074
Basevi v. Serra .. ..	.. 568	— v. Banks .. ..	.. ii. 823
Bashford v. Cann .. ..	.. ii. 1073	— v. Blyth .. ..	.. ii. 1070
Basil v. Acheson .. ..	.. ii. 965	— v. Carter .. ..	.. 14, ii. 1049
Baskett v. Cafe .. ..	.. ii. 932	— v. Cartwright .. ..	.. ii. 1037, 1119
— v. Keel .. ..	.. ii. 1100	— v. London and North-West-	
Bastard v. Clarke .. ..	.. 341	ern Railway Company ..	.. 81
Batchelor v. Lawrence ..	.. ii. 832	— v. Bank of London .. ..	.. 58, 62
Batchelor v. Middleton ..	.. ii. 741, 743, 772, 780, 895, 933, 948, 1000	— v. Simpson .. ..	.. 232, 234
Bate, Exp. .. ..	.. ii. 822, 1011	— v. Spereiman .. ..	.. 418
Bateman v. Mayor of Ashton	.. 263	— v. Taylor .. ..	.. 203, 211
Bates v. Beaufort .. ..	.. 31	Bellamy v. Brickenden ii.	946, 967, 1030
— v. Bonnor .. ..	.. ii. 1084	— v. Cockle .. ..	.. 508, ii. 1079
— v. Brothers .. ..	.. 383, ii. 621	— v. Sabine .. ..	.. 582
— v. Dandy .. ..	.. 269, 271	— v. Saull .. ..	.. ii. 1171
— v. Hillecot .. ..	.. ii. 1037, 1050	Belt, Exp. .. ..	.. ii. 644
— v. Johnson .. ..	.. ii. 605, 614	Belvedere v. Rochfort ..	.. ii. 680, 690
Bath (Earl of) v. Earl of Bradford	285	Benbow v. Davies .. ..	.. ii. 1030, 1104
Bather v. Kearsley .. ..	.. 380	Benham v. Keane 104, 127, 128; ii.	628, 667, 671
Batson, Exp. .. ..	.. 238	Bennett, Exp. .. ..	.. ii. 1083
Batty v. Chester .. ..	.. 248	— v. Bernard .. ..	.. 353
Baud v. Fardell .. ..	.. 288	— v. Cooper .. ..	.. 363
Bawtree v. Watson .. ..	.. 166, ii. 839	— v. Daniell .. ..	.. 111
Baxter v. Manning .. ..	.. ii. 616	— v. Edwards .. ..	.. ii. 1084
— v. Portsmouth .. ..	.. 370	— v. Johnson .. ..	.. 198, 200
— v. Pritchard .. ..	.. 232	— v. Powell .. ..	.. 471
Baylies v. Baylies .. ..	.. 406, 412	— v. Wyndham .. ..	.. 285
Bayly v. Robson .. ..	.. ii. 616	Benson v. Duncan .. ..	.. 88, 98
— v. Wilkins .. ..	.. ii. 933	— v. Scott .. ..	.. 22
Baynard v. Simmons .. ..	.. 481	Bentham v. Haincourt ..	.. ii. 624, 968
Bazzalgetti v. Battine ..	.. ii. 720	Bentinck v. Willink ..	.. 8, 314; 1101
Beale v. Symonds .. ..	.. ii. 762	Bentley, Exp. .. ..	.. 28
Beales v. Tennant .. ..	.. 51	— v. Bates .. ..	.. 324, ii. 766
Beare v. Prior .. ..	.. ii. 936	Benyon v. Amphlett .. ..	.. 210
Beaufort (Duke of) v. Phillips	.. 121	— v. Nettlefold .. ..	.. 248
Beaumont, Exp. .. ..	.. ii. 1083	Berkeley, Exp. .. ..	.. ii. 1013
— v. Beaumont .. ..	.. 388	— v. King's College .. ..	.. 257
— v. Foster .. ..	.. 318	— v. Lord Reay .. ..	.. ii. 914
Beaumont's Mortgage Trusts, Re	520	Bermingham v. Burke ..	.. 353
Beavan v. Lord Oxford 126, 127, 128,	235; ii. 667, 668	Bernal v. Pim .. ..	.. 189

	PAGE		PAGE
Bernard v. Davies ..	517	Black v. Rose ..	191
— v. Drought ..	588	— v. Smith ..	791
— v. Norton ..	ii. 789, 1103	Blackburn, Exp. ..	231
— v. Sadler ..	ii. 1005	— v. Cane ..	ii. 1056
Berndtson v. Strang ..	ii. 857, 858	— v. Warwick ..	ii. 982, 983
Berney v. Sewell 382, 383, 384, 385 ;		Blackford v. Davis ..	ii. 925, 946, 952
	ii. 937	Blacklock v. Barnes ..	ii. 945
Berridge, Exp. ..	ii. 638, 639	Blackwell v. England ..	51
Berrie v. Howitt ..	162	— v. Symes ..	ii. 611
Berrington v. Evans 78, 352 ;	ii. 975	Blades v. Blades ..	ii. 654, 655
Berrisford v. Milward ..	ii. 878	Blagrove v. Clunn ..	ii. 767, 768
Berry v. Gibbons ..	287, 584	— v. Routh ..	246, ii. 924
— v. Hebblethwaite ..	ii. 1008	Blair v. Nugent ..	358, ii. 740
Bertie v. Lord Abingdon ..	381, 431,	— v. Ormond ..	323, ii. 1176
	436 ; ii. 969, 973	Blake v. Foster ..	715, 716, 735, 759,
Bertrand v. Davies ..	151, 152		940
Bessey v. Windham ..	238	— v. Nicholson ..	197, 199
Bessford v. Blakesley ..	310, 311	Blakeley, Exp. ..	ii. 1081
Best v. Pom broke ..	478	— v. Dent ..	304
Bethell v. Green ..	ii. 700	Blakeney v. Dufaur ..	381
Betton's Trust Estates, Re ..	ii. 753	Blakesley, Re ..	ii. 1019
Benlah Park Estate, Re ..	263	Blanchard, Re ..	212
Bevan, Exp. ..	534, ii. 982	— v. Cawthorne ..	397
—, Re ..	207	Bland, Exp. ..	199, 232, ii. 840
— v. Habgood ..	454	Blandy v. Kimber ..	272, ii. 934
— v. Waters 180, 186, 197, 199		(Blank), Exp. 529 ;	ii. 1011, 1013
Beytagh v. Concannon ..	429	— v. — ..	390
Bickham v. Cross ..	ii. 984	— v. Jolland ..	405, 431
— v. Crutwell ..	ii. 693, 694	— v. Lindsay ..	401, 410
Bickley v. Dorrington ..	ii. 900	— v. Trecothick ..	ii. 1000
Biddle, Re ..	ii. 1024	Bleaden v. Hancock ..	197
Biddulph, Exp. ..	534	Blenkarne v. Jennens ..	557
— v. St. John 569 ;	ii. 655, 791,	Blenkinsopp v. Foster ..	154
	1051	Blennerhassett v. Day ..	ii. 606, 944
Biggs v. Andrews ..	541, ii. 776	Blewitt v. Thomas ..	362
Bignold, Exp. 526, 529, 589, ii. 929		Bligh v. Benson ..	314, 354
Bill v. Cureton ..	234	— v. Brewer ..	114
Billinghurst v. Walker ..	ii. 687	— v. Davies ..	ii. 840
Billson v. Scott ..	ii. 1105	Blois v. Betts ..	881
Bingham v. Gregg ..	337	Blomfield v. Blake ..	240
— v. King ..	ii. 1038	Bloomar, Re ..	277
Binnington v. Harwood 504 ;	ii. 961,	Bloomer v. Union Coal and Iron	
	962, 1007	Co. ..	268
Binns v. Nicholls ..	ii. 710	Blount v. Hipkins ..	ii. 695
— v. Pigott ..	187	Bloxam v. Sanders 186 ;	ii. 838, 844,
Birch v. Ellames 509, 572, 590, ii. 871			846, 852, 868
— v. Wright ..	451	Bloxham, Exp. ..	536
Birchall v. Pugin ..	161	Bloye's Trust, Re ..	490
Bird v. Brown ..	ii. 850, 865, 867	Blundell v. Stanley ..	ii. 816
— v. Gandy ..	ii. 891, 923, 938, 1061	Blunden v. Desart ..	204, ii. 622
— v. Heath ..	ii. 1050	Blunt v. Clitheroe ..	420
Birds v. Askey ..	154, ii. 710	Blyth v. Carpenter ..	ii. 732
Birley v. Gladstone 189, 190, 193		Boaler v. Mayor ..	ii. 822
Birmingham, &c. Coke Co., Exp. ii. 676		Boardman v. Sill ..	ii. 842
Birnie v. Caystille ..	ii. 744	Boek v. Gorrisen ..	183
Bisco v. Earl Banbury ..	561	Boddingtons ..	90, 98
Bisdee, Exp. ..	38, 305, ii. 1012	Bodenham v. Purchas ..	ii. 799
Bishop, Exp. ..	225	Boden's Estate, Re ..	ii. 1095
— v. Sharp ..	ii. 939	Bodger v. Bodger ..	37
— v. Ware ..	193	Bohtlingk v. Inglis ..	ii. 858
Bishop's Waltham Ry. Co., Re ..	514	Bolecow v. Herne Bay Pier Com-	
Bittlestone v. Cooke ..	232	pany ..	327
Blaauwpot v. Da Costa ..	153	Bold Buccleugh 168, 172, 176, 177	
Blackford v. Woolley ..	274	Bolding v. Lape ..	359, ii. 990

	PAGE		PAGE
Bolland v. Bygrave ..	218, 219	Bozon v. Bolland ..	10, 159, 206, 207, 209
Bolton v. Lancashire, &c. Railway Company ..	ii. 859, 863	—— v. Williams ..	37, 573
—— v. Fuller ..	157	Brace v. Duchess of Marlborough ..	ii. 600, 601, 607, 608, 609, 614, 615, 668, 826, 1009
—— v. Stannard ..	282	Braddick v. Smith ..	324
Bonafous v. Rybot ..	ii. 994	Bradford v. Belfield ..	493
Bonaparte ..	86, 88	Bradley v. ——— ..	82
Bonbonus, Exp. ..	298	—— v. Borlase ..	ii. 1029
Bond v. England ..	ii. 690, 691	—— v. Copley ..	456
—— v. Kent ..	ii. 836	—— v. Heath ..	ii. 798
—— v. Warden ..	ii. 838	Bradshaw v. Outram ..	ii. 779, 897
Bonham v. Newcomb ..	11, 320, 347; ii. 731	Bradwell v. Catchpole ..	6
Bonithon v. Hockmore ..	ii. 953	Brady v. De Crespigny ..	259
Bonney, or Bonny v. Ridgard ..	576, 578, ii. 742	Bradyll v. Ball ..	ii. 843
Bonser v. Bradshaw ..	161	Brain v. Harden ..	ii. 882
Bonzi v. Stewart ..	293	Braithwaite v. Braithwaite ..	ii. 931
Booth, Re ..	545	—— v. Britain ..	287
—— Exp. ..	528	Bramwell v. Eglinton ..	438, 457
—— v. Allington ..	ii. 994	Brandao v. Barnett ..	179, 219
—— v. Booth ..	325	Brandling v. Ord ..	ii. 605
—— v. Creswicke ..	367; ii. 766, 918, 1005, 1045, 1055	Brandon v. Brandon ..	407; ii. 648, 830, 944, 945
—— v. Leycester ..	ii. 974, 975, 976, 977	Branker v. Molyneux ..	63
—— v. Rich ..	517, ii. 1084	Bransdon v. Allard ..	164
Boote v. Blundell ..	284, ii. 692	Brassington v. Brassington ..	209, 210
Borell v. Dann ..	570	Bray v. Hanson ..	ii. 1172
Borrodaile, Exp. ..	37	—— v. Hine ..	201
—— v. Brickwood ..	ii. 678	—— v. Manson ..	113
Bosanquet, Exp. ..	217, 298	Braye (Baroness), Exp. ..	ii. 1015
Bostock v. Shaw ..	ii. 897	Brearclyff v. Dorrington ..	541; ii. 643, 663, 667
Bothamley v. Fairfax ..	ii. 595	Brecon (Mayor of) v. Seymour ..	ii. 640, 1061
Bott v. Smith ..	230	Breech-loading Armoury Co., Re ..	545, 559
Boulton, Exp. ..	33, 40, 559	Breerton v. Jones ..	ii. 607
Bourne v. Bourne ..	497, 541	Bremner, Exp. ..	160
Bourton v. Williams ..	ii. 795	Brend v. Brend ..	ii. 746, 759
Bovey v. Skipwith ..	ii. 602, 633	Brenen v. Carrint ..	181
—— v. Smith ..	568	Brett, Exp. ..	227, 532
Bovill, Exp. ..	246	Brottle v. Burdett ..	ii. 829
Bowden, Exp. ..	163, 534	Brewin v. Austin ..	ii. 985
—— v. Henderson ..	ii. 774	Briant v. Lightfoot ..	ii. 1005
Bowen v. Brecon, &c. Railway Company ..	329	Brice v. Williams ..	ii. 650
—— v. Evans ..	587, 588	Bridge v. Beadon ..	545, ii. 641
—— v. Fox ..	62	Bridges v. Longman ..	286
Bowersbank v. Colasseau ..	379	Bridgman v. Dove ..	ii. 693
Bowes v. Foster ..	238	Bridgwater v. De Winton ..	318
—— v. Heaps ..	ii. 1001	Brierley v. Kendall ..	68
Bowker v. Bull ..	ii. 636, 825	Brierly v. Ward ..	ii. 1104
Bowles v. Perring ..	ii. 1013	Briggs, Exp. ..	ii. 1083
Bowman v. Bell ..	402	—— v. Chamberlain ..	269
—— v. Malcolm ..	216	—— v. Earl of Oxford ..	158
Bowra v. Wright ..	ii. 1087	—— v. Jones ..	ii. 874
Bowyer v. Woodman ..	ii. 987	—— v. Merchant Traders, &c. Association ..	199
Boyd v. Barker ..	ii. 1131	—— v. Wilkinson ..	465
—— v. Burke ..	ii. 930	Bright's Trusts, Re ..	570
—— v. Higginson ..	ii. 742	Brightwen, Exp. ..	ii. 1011
—— v. Shorrocks ..	54	Brighty v. Norton ..	457
Boydell v. Manby ..	ii. 1048, 1079	Briacoe v. Kenrick ..	ii. 891, 902
Boyle, Exp. 104, 105, 541; ii. 616, 669, 761, 1049		Bristed v. Wilkins ..	333, 392
Boys v. Ford ..	342		

	PAGE
Bristol v. Hungerford ..	ii. 614, 620
Bristow v. Warner ..	.. 246
— v. Whitmore ..	147, 169, 214
Bristowe v. Needham ..	407, 426
British Empire Shipping Co. v. Somes ..	.. 183
British Mutual Investment Co. v. Smart ..	.. 578, ii. 669
British Provident, &c. Society, Re ..	267
Britten v. Wait ..	.. 473
Brixton v. Snee ..	.. 95
Broad v. Selfe ..	241; ii. 957, 1007
— v. Wickham ..	.. 417
Broadbent, Exp. ..	.. 35, 528
— app., Varley, resp. ..	539
— v. Barlow ..	566, ii. 708
Broadway v. Morecraft ..	.. ii. 982
Broadwood, Exp. ..	.. 29
— v. Granara ..	.. 187
Brocklehurst v. Jessop ..	322, 357, 510
Brodie v. Barry ..	.. 388
Brodrick v. Scale ..	.. 51
Bromage, Exp. ..	.. ii. 1083
Bromitt v. Moor ..	.. ii. 723, 724
Bromley, Re ..	.. 560
— v. Smith ..	.. 243, ii. 1074
Brooke, Re. ..	.. ii. 1015
— v. Stone ..	.. ii. 947
— v. Warwick ..	.. ii. 695
Brookfield v. Bradley ..	.. ii. 1090
Brooks v. Greathhead ..	385, 393, 418, 420
Brooksbank v. Higginbottom ..	ii. 1036
Broomfield, Exp. ..	.. ii. 702
— v. Southern Ins. Co. ..	ii. 882
Brotherse v. Bence ..	.. 553
Brotherton v. Hatt ..	.. 553, ii. 624
Brouard v. Dumaesque ..	489, 495
Brougham (Lord) v. Cauvin ..	.. 311
Broughton v. Davies ..	.. ii. 665
Browell v. Read ..	.. 388
Brown, Exp. ..	.. 219
— v. Bamford ..	.. 275
— v. Barkham ..	ii. 981, 984, 995
— v. Bateman ..	.. 54
— v. Cole ..	.. ii. 729, 735
— v. Freeman ..	.. ii. 1073
— v. Gordon ..	.. 146
— v. Hare ..	.. ii. 858
— v. Heathcote ..	.. 238
— v. Kempton ..	.. 231
— v. Lockhart ..	.. 315
— v. Lynch ..	.. 353
— v. Metropolitan Life Assu- rance Society ..	447, 448
— v. Newall ..	.. 390
— v. North ..	.. ii. 858
— v. Perrott ..	.. 476
— v. Price ..	.. 373, ii. 946
— v. Rye ..	.. ii. 714
— v. Sewell ..	ii. 1100, 1101, 1102
— v. Stead ..	ii. 806, 820, 886
— v. Tanner ..	.. ii. 646, 647
— v. Thorpe ..	.. ii. 877
— v. Wilkinson ..	.. 174

	PAGE
Browne v. Edwards ..	.. ii. 759
— v. Lockhart ..	313, 315; ii. 787, 905, 1000, 1020
— v. London Necropolis, &c. Co. ..	.. 322
— v. Savage ..	.. 543, 560
Brownlow v. Keatinge ..	.. ii. 888
Brownrigg v. Rae ..	.. 299
Brownson v. Lawrance ..	.. ii. 700
Bruce, Exp. ..	.. 37
— v. Garden ..	.. ii. 1073
— v. Morice ..	.. ii. 687
— v. Wait ..	.. 178
Bruere v. Wharton ..	.. ii. 985
Brundekin, Exp. ..	.. 144
Brunsdon v. Allard ..	.. 164
Brustead v. Buck ..	.. 199
Bryan v. Cormick ..	.. 385
Bryant, Exp. ..	.. 163
— v. Blackwell ..	.. ii. 1010
Bryson v. Wylie ..	.. 239
Bubb v. Yelverton ..	.. 253
Buchanan v. Greenway ..	ii. 963, 1029, 1056, 1108
Buckinghamshire (Earl of) v. Ho- bart ..	.. ii. 819
Buckland v. Pocknell ..	.. ii. 835
Buckler v. Mitchell ..	.. 236
Buckley v. Barber ..	.. 300
— v. Buckley ..	.. 440
Bucks (Duke of) v. Gayer ..	.. ii. 944
Bugden v. Bignold ..	580; ii. 705, 706
Bull v. Faulkner ..	180; ii. 841, 941
— v. Hutchens ..	.. 584
Buller v. Plunkett ..	.. 78, ii. 641
Bullmore v. Wilyams ..	.. 247
Bulkeley v. Hope ..	.. ii. 805, 812, 816
Bulmer v. Hunter ..	.. 229
Bulpin v. Clarke ..	.. 273
Bulstrode v. Bradley ..	.. ii. 937
Bulwer v. Astley ..	.. ii. 969, 972
Bunbury v. Winter ..	388; ii. 955, 956
Bunney v. Poyntz ..	.. ii. 838, 844
Burbridge, Exp. ..	.. 559
Burden v. Oldaker ..	.. ii. 1026
Burdon v. Kennedy ..	.. 471
Burgess v. Eve ..	.. ii. 613
— v. Mawbey ..	ii. 968, 969, 973
— v. Moxon ..	.. 36, 37
— v. Sturges ..	.. ii. 890
— v. Wheate ..	.. 141, ii. 762
Burgh v. Francis ..	.. ii. 594, 663
— v. Langton ..	.. ii. 1059
Burgaine v. Spurling ..	.. ii. 788
Burgoyne v. Hatton ..	.. 563, 566
Burke v. Lynch ..	.. ii. 735
— v. O'Connor ..	.. ii. 1017
Burlace v. Cook ..	.. 587, 588
Burmester v. Moxon ..	.. ii. 1079
Burn v. Carvalho ..	.. 8, 81, 82
Burne v. Robinson ..	.. 120, ii. 934
Burnel v. Ellis ..	.. ii. 604
Burnell v. Martin ..	.. 321
Burrell's Case ..	.. 235

	PAGE		PAGE
Burrell, Exp.	ii. 929	Calypso	89
—, Re	ii. 1058	Cambrian Railway Company's	
— v. Egremont 355; ii. 811, 819, 821		Scheme	331
Burridge v. Row	149	Camden v. Anderson	ii. 647
Burrough v. Cranston	ii. 796	Cameron's, &c. Railway Company,	
Burrowes v. Gradin	441	In re	209, 210
— v. Molloy 320, 347, 348, 383; ii. 717, 719, 729, 730, 945, 994		Campbell v. Dent	ii. 800
Burt, Exp.	529	— v. Hooper	370
— v. Bernard	394	— v. Moxhay	ii. 1052, 1079
— v. Trueman	283	— v. Mullett	143, 146
Barton v. Gray	34	Campion v. Colvin	190, 193
— v. Roberts	480	— v. Cotton	229
— v. Slattery	ii. 994	Cane v. Allen	245
Bury v. Bury .. 557, 567, 570, 591		— v. Martin	206
Bushell v. Bushell .. 580, 581, ii. 654		Canham v. Rust	373
Busk v. Davis	ii. 860	Cann v. Taylor	360
— v. Fearon	101	Cannan v. Meaburn	174, 175
— v. Lewis	210	Canning v. Hicks	345
Butchart v. Dresser	299	Cannock v. Jauncey 310, 312, ii. 877	
Butcher, Exp.	225	Cant, Exp.	ii. 1024
— v. Churchill	ii. 932	Cantrell v. Mannington	591
— v. Stapeley	543	Capel v. Butler	ii. 830
Bute (Marquis) v. Cunyngame ii. 700		Capel's Case	ii. 596
Butler v. Bernard	ii. 779	Capper v. Spottiswoode	ii. 835
— v. Butler	ii. 687	— v. Terrington	ii. 1021, 1098
— v. Earl of Portarlington .. 549		Car v. Boulter	ii. 902
— v. Woolcot	188, 200	Carbery (Lord) v. Preston	355
Butler's Case	ii. 972	Card v. Jaffray	13
Buxton v. Monkhouse	327, 382	Carew, Re	ii. 1035
— v. Snee	168	— v. Cooper	255
Byam v. Sutton	ii. 817, 818	— v. Johnston	ii. 739
Bycroft v. Sibel	310	Carey v. Doyne	ii. 964
Byerley v. Prevost	53	Carlisle v. Berkley	380
Byne v. Vivian	ii. 1045	— v. Carlisle	380
Byrn v. Godfrey	ii. 801, 802	— (Earl of) v. Globe	346
Byrne v. Lord Carew	ii. 921	— v. Whaley	ii. 654
Byron's Settlement, Re	ii. 1014	— (Mayor of) v. Blamire	23
Bywater, Re	403	Carlton, Exp.	ii. 929
		— v. Farlar	511, ii. 1047
		Carpenter v. Parker	451
		Carr v. Acraman	26
		— v. Burdiss	232
		— v. Henderson	ii. 827
		Carr's Trusts, Re	272
		Carrick, Exp.	218, 219
		Carruthers, Exp.	82
		Carter, Exp.	ii. 632, 885
		— v. Barnardiston	ii. 692, 700
		— v. Carter	ii. 604, 606, 875
		— v. Hughes	ii. 708
		— v. Palmer	368, ii. 932
		— v. Sanders	577, 578
		Cartwright v. Philpott	523
		Casamajor v. Strobe	411
		Casberd v. Att.-Gen. 36; ii. 665, 906, 942	
		Casborne v. Scarfe	ii. 715
		Casburne v. Inglis	ii. 761
		Cash v. Belcher	ii. 887, 1027, 1030
		Castellain v. Thompson	197
		Castle v. Duke	465
		Cathcart	64
		Catherine	87; ii. 882, 1018
		Cathorpe, Exp.	288

C.

Caddick v. Cook	ii. 884
Cadle v. Fowle	342
Cadogan v. Kennett	237
Cail v. Papayanni	173
Caillard, Exp.	401
Caldecott v. Caillard	315
Caldwell, Exp.	ii. 644
— v. Dawson	ii. 1175
Caledonia	170
Calisher v. Forbes .. 561; ii. 612, 620	
Callow v. Howle	274
Calne Railway Company, Re	514
Calton v. Bragg	ii. 963
Calverley v. Phelp	ii. 909
Calvert v. Adams	389
— v. Routh	344
Calwell, Exp.	ii. 927

	PAGE		PAGE
Catley v. Simpson ..	.. ii. 779, 899	Chieftain ..	.. 169
Catlin, Re ..	.. 427	Chilton v. Carrington ..	.. ii. 1061
Cattlin v. Kernot ..	.. ii. 840	Chinery v. Viall ..	.. 68
Cato v. Irving ..	465; ii. 647, 648	Chinnery v. Evans ..	359, 360, ii. 987
Cator v. Charlton ..	.. ii. 682	Chinnock v. Sainsbury ..	.. 2
— v. Cooley ..	.. 580, ii. 654	Chipp v. Harris ..	.. 113, 115
— v. Pembroke ..	140, 142, 570, 576	Chissum v. Dewes ..	38; ii. 827, 1008,
— v. Reeves ..	.. ii. 1081		1077
Caulfield v. Maguire ..	.. ii. 972	Cholmeley v. Countess Oxford ..	ii. 717,
Cavander v. Bulteel ..	.. 573		1106
Cave v. Cork ..	.. ii. 897, 907	Cholmondeley v. Clinton ..	207; ii. 735,
— v. Foulks ..	.. ii. 719		736, 737, 777, 885, 889, 895, 897
Cawthorne, Re ..	.. ii. 644	Chowne v. Baylis ..	.. 81, 253
— v. Holben ..	.. ii. 1178	Christian v. Field ..	.. 147, ii. 769
Chadwick v. Holt ..	.. 121	Christie v. Lewis ..	.. 190
— v. Turner ..	.. ii. 658	Christmas v. Christmas ..	.. ii. 685
Chalk v. Raine ..	.. 368	Christophers v. Sparke ..	.. ii. 897
Challen v. Shippan ..	.. 422	Chuck v. Freen ..	.. 299
Challie v. Gwynne ..	.. 343	Church v. Bishop ..	.. ii. 999
Challis v. Cashborn ..	.. ii. 616	Churchill v. Grove ..	.. 583, ii. 609
Chamberlain v. Thacker ..	.. ii. 909	Citizen's Bank, Louisiana v. First	
Chambers v. Davidson ..	77, 102, 151	National Bank, New Orleans ..	81
— v. Goldwin G, 14, 384; ii. 901,		City Bank v. Luckie ..	.. 218
921, 923, 924, 936, 953, 955,		City Bank Case ..	.. 102, 299
980, 982		City Discount Company v. M'Lean	
— v. Howell ..	579, 590		.. ii. 799
— v. Manchester and Mil-		Clack v. Holland ..	150; ii. 623, 645
ford Railway Company ..	262,	Clare v. Bedford ..	.. ii. 881
ii. 1140		— v. Wood ..	368, 511; ii. 1000, 1027
— v. Waters ..	.. 490	Clarendon (Earl) v. Barham ..	ii. 689,
Champernown v. Gibbs ..	.. 382		690, 805, 818, 927
— v. Scott ..	.. 201	Clark, Exp. ..	.. 535
Champion, Exp. ..	.. ii. 982	— v. Burgh ..	.. ii. 753
Chandos (Duke) v. Talbot ..	ii. 805, 810	— v. Cook ..	.. ii. 938
Change ..	.. 93, ii. 996	— v. Crownshaw ..	.. 28
Chaplin v. Chaplin ..	ii. 760, 968, 972	— v. Gilbert ..	.. 486, 487
— v. Young ..	.. 397, ii. 943	— v. Smith ..	.. 164
Chapman v. Allen ..	.. 180	— v. Wilmot ..	589; ii. 926, 1028
— v. Beecham ..	.. 448	Clarke v. Abingdon (Lord) ..	.. ii. 978
— v. Chapman ..	.. 37, 40	— v. Batters ..	.. 62
— v. Duncombe ..	.. ii. 724	— v. Brereton ..	.. ii. 700
— v. Emery ..	.. 235	— v. Dew ..	.. 386
— v. Haw ..	.. 164	— v. Panopticon ..	.. 286
— v. Tanner ..	.. ii. 944	— v. Royle ..	.. 140, ii. 835
Chappel v. Comfort ..	.. 193	— v. Seton ..	.. ii. 978
Chappell v. Rees ..	ii. 706, 888, 1040,	— v. Spence ..	.. 239
1064, 1107, 1126		— v. Willott ..	.. 236
Charles Amelia ..	.. ii. 882	Clarke's Trusts, Re ..	.. ii. 1096
Charlton's (Ichmere) Case ..	.. 404	Clay v. — ..	.. ii. 1061
Charlton v. Low ..	.. ii. 601	— v. Harrison ..	.. ii. 847
Chartered Bank of India v. Hen-		Clayton, Exp. ..	.. 425, ii. 702
derson ..	.. ii. 853	Clayton's Case ..	.. ii. 799, 800
Chase v. Box ..	.. ii. 798	Cleary v. M'Andrew ..	172, 198, ii. 650
— v. Westmore ..	.. 181	Cleland, Exp. ..	.. 167
Chater v. Maclean ..	.. 415	Clench v. Witherley ..	.. 14
Chedworth (Lord) v. Edwards ..	ii. 882	Clerkson v. Bowyer ..	.. 346, ii. 907
Cheesman, Exp. ..	.. ii. 843, 882	Cleveland v. Dashwood's Executors	
— v. Exall ..	.. 66, 69		.. ii. 795
Cheslyn v. Dalby ..	.. 246	Cliff v. Wadsworth ..	ii. 794, 998, 1004,
Cheshyre v. Biss ..	.. ii. 807		1006
Chester v. Willes ..	.. ii. 805, 810	Clifford v. Clifford ..	.. ii. 815, 819
Chesterfield (Earl) v. Cromwell ..	ii. 984	— v. Turrill ..	.. 210
Cheval v. Nichols ..	.. ii. 654, 655	Clinton v. Bernard ..	.. 518, ii. 1087
Chichester v. Marquis of Donegall ..	309	— v. Hooper ..	.. ii. 684, 686

	PAGE		PAGE
Close v. Holmes	293	Collins v. Plummer	78
— v. Phipps	489, ii. 788	— v. Shirley	ii. 887, 1030, 1108, 1109
— v. Waterhouse	198, 200	Collinson v. Lister	287, ii. 623
Clough v. Dixon	ii. 899	Collyer v. Falcon	254
Clouten, Exp.	40, 526	Colman v. Sarrel	569
Clowes v. Hughes	446	Colmer v. Ede	202
— v. Waters	ii. 978	Colombian Government v. Roths- child	ii. 925
Coates v. Coates	ii. 830	Colombine v. Penhall	229
— v. Railton	ii. 861	Colonial, &c. Gas Company	267
— v. Williams	233	Colvill, Exp.	539
Cobbett v. Brock	369	Colyer v. Colyer	ii. 1064, 1065
Cobham, Exp.	ii. 1012	— v. Finch	282, 283, 587, 589, ii. 871, 877
Cockburn v. Ankett	518	Coming, Exp.	35
— v. Raphael	401	Commercial Bank, Exp.	ii. 1082
Cockell v. Bacon	321, 332	Commissioners of Public Works v. Harby	546; ii. 877, 878
— v. Taylor	ii. 648, 878, 1004, 1020	Compton v. Lord Oxendon	ii. 702, 812
Cocker v. Bevis	ii. 1055	Congreve v. Evetts	ii. 669
— v. Egremont	ii. 913	Connell, Exp.	534
— v. Musgrove	477	— v. Hardie	ii. 1011
Cockes v. Sherman	ii. 893	Conning, Exp.	53
Cockran v. Irlam	215	Consolidated Investment Company v. Riley	540
Cocks, Exp.	ii. 621	Constable v. Howick	ii. 968, 1056
— v. Grey	ii. 948	Constancia, La	88, 172, ii. 649
— v. Harman	212	Constantia	ii. 847, 852
— v. Stanley	ii. 1005	Conway v. Shrimpton	ii. 739, 984
Cockshott v. Bennett	252	Cood v. Pollard	ii. 836, 842
Codrington v. Johnstone	412, ii. 930	Cook v. Black	40, ii. 644
— v. Parker	385	— v. Dawson	282, 286
Coggs v. Bernard	7, 64, 65, 458, 461	— v. Dodd	7
Cognac	90, 94, 100	— v. Fowler	109; ii. 966, 993
Cohen, Exp.	50, 231	— v. Gregson	ii. 673
Colby v. Gibson	321, ii. 839	— v. Guerra	440
Cole v. Blake	ii. 793	— v. Hart	ii. 827, 1008
— v. Coles	ii. 873	— v. Rogers	231
— v. Gibson	249	— v. Sadler	ii. 1056
— v. Muddle	154, 578, ii. 648	— v. Walker	237
— v. N. W. Bank	293	Cooke v. Brown	ii. 1006
— v. Stutely	ii. 811	— v. Crawford	493
Colebrook v. Leyton	473	— v. Gwyn	403
Coleby v. Coleby	ii. 696	— v. Lamotto	369
Colegrave v. Manley	205, 206, 209	— v. Wilton	ii. 601
Coleman, Exp.	528	Cookson v. Lee	ii. 622
— v. Mason	393, ii. 930	Coombe, Exp.	35, 37, 510
— v. Mellersh	ii. 923	— v. Stewart	ii. 1053
— v. Duke of St. Albans	ii. 927	Coombs, Re	198
— v. Winch	ii. 616, 617	Coope v. Cresswell	358
Colemere, Re	234	Cooper, Re	541
Coles v. Forrest	ii. 894, 909, 910, 917, 1021, 1023	— v. Bill	180, ii. 861
— v. Trecothick	ii. 932	— v. Cartwright	ii. 1066
Collard v. Allison	387	— v. Grant	113
— v. Hare	ii. 737	— v. Hewson	209
Collet v. Munden	ii. 639, 632	— v. Jenkins	ii. 830
Collett v. Newnham	ii. 965	— v. Reilly	398
— v. Preston	166	— v. Willomatt	457
Collingridge v. Paxton	477	Coort, Exp.	ii. 1013
Collingwood, Re	ii. 1097	Coots v. Jecks	55
— v. Russell	283	— v. Lowndes	ii. 698
Collins, Exp.	52	— v. Mammon	552
— v. Archer	588	Cope v. Cope	ii. 680, 682, 701
— v. Collins	ii. 835		
— v. Lamport	464		
— v. Martin	157, 297		

	PAGE		PAGE
Cope v. Doherty	174	Cragg v. Alexander	495
Copeland, Exp.	219	— v. Taylor	116
Copis v. Middleton ii. 756, 831, 900		Craggs v. Grey	1019
Copland, app. v. Bartlett, resp. ..	448	Crane v. Drake	577
Coppin v. Fernyhough	561	Cranmer, Exp.	425
— v. Gray	742	Cranver, &c. Mining Company v. Williams	717
Coppring v. Cooke	944	Craven v. Ryder	855
Corbet v. Mahon	394	Crawly's (Lord) Case	563
Corbett v. Barker	736	Crawshaw v. Eades	863
Corder v. Morgan	496	Crawshay v. Homfray	181, 186
Cordwell v. Mackrill	568	Credland v. Potter	43, ii. 663
Cork (Earl of) v. Russell ii. 767, 892, 1028		Creed, Re	775
— v. Youghal Railway Co., Re. ..	263	Cremen v. Hawkes	882
Corlett, Exp.	1012	Creuzé v. Hunter	974, 984, 986
Cormack v. Beisley	621	— v. Bishop of London	379
Cornelia, Henriette	946	Crewe (Lord) v. Edleston	304, 398
Coromandel	650	Cripps v. Joe	14
Corsellis v. Patman	1080	Crisp, Exp.	756
Corser v. Cartwright	282	— v. Platel	310, 315, 415
Cort v. Sagar	81	Croft v. Graham	241
Cory v. Kyre 38, 289; ii. 623, 625		— v. Lumley	110, 258
— v. Gertcken	881	Crofton v. Ormsby	571, 573
Cosser v. Collinge	561, 571	Crompton v. Earl of Effingham ii. 1055	
Costigan v. Hastler	450	— v. Leo	1055
Cotham v. West	ii. 959, 962	Cropper v. Mellorsh	910
Cottam v. Eastern Counties Railway Company	ii. 796, 872	Crosbie v. Tooke	259
Cotter v. Bank of England	324	Crosby v. Church	275
Cotterell v. Stratton ii. 1002, 1004, 1035		— v. Crouch	231
Cottingham v. Earl Shrewsbury ii. 922, 1040		Cross v. Sprigg	802
Cottle v. Warrington	670	Crosso v. Bedingfield	975
Cotton, Exp.	28	— v. General Reversionary, &c. Company	ii. 828, 1009
— v. Cotton	118	Crossfield, Exp.	39
— v. Iles	345	Crossley, Exp.	536
Cottrell v. Finney	ii. 984	— v. Elsworthy	229, 230
— v. Purchase	15	Crow v. Wood	416
Courand v. Hanmer	427	Crowe's Mortgage, Ro	ii. 1094
Courtenay v. Wright	ii. 1073	Crowfoot v. Gurney	81, 83
Courtney v. Taylor	372	— v. London Dock Company	66
Courtoy v. Vincent	117, 118	Crowther v. Crowther	123
Coventry v. Gladstone ii. 852, 856, 859		Croxon v. Lever	ii. 1105
Coward v. Chadwick	391, 402	Cruikshank v. Duffin	283, 286
Cowasjee v. Thompson	ii. 860	Cruse v. Nowell	494
Cowbridge Railway Company, In re ..	513	Cuddington v. Withy	ii. 939
Cowdry, Exp.	ii. 1082	Cuddon, Exp.	ii. 1082, 1083
— v. Day	246, ii. 730	Cullen, Re	179
Cowell, Exp.	30	Cullwick v. Swindell	28
— v. Betteley	159	Culpeper v. Aston	583
— v. Simpson	ii. 838	Culverhouse v. Wickens	482
Cowper v. Green	ii. 801	Cuming v. Brown	ii. 853
Cox, Exp.	ii. 615	Cumming v. Prescott	34
— v. Champneys 382, 406, ii. 955		Cumpston v. Haigh	183, 184
— v. Dolman	363, ii. 988	Cunningham, Exp.	157
— v. Goodfellow	303	Cupit v. Jackson 285, 382, ii. 801	
— v. Lord Mayor of London	109	Curling v. Shuttleworth	494
— v. Peel	ii. 1060	Currie v. Nind	234
— v. Toole	509	Curtin v. Dancey	ii. 887
Coxe v. Harden	ii. 866	Curtis v. Drought	ii. 795
Cozens v. Bognor Railway Company	516	— v. Holcombe	12, ii. 1106
Craddock v. Piper	470	— v. Rush	ii. 829
		Cutbill v. Kingdom	ii. 785
		Cutfield v. Richards 501; ii. 827, 1010	

Cuthbertson v. Irving ..	..	453
Cutler v. Cremer ..	..	ii. 738
Cynthia ..	..	87, 95

D.

Dacre v. Patrickson ..	..	ii. 692, 696
Dady v. Hartridge ..	..	ii. 700
Daglish, Exp. ..	..	54
D'Aguila v. Lambert ..	..	ii. 849, 850
Dalby v. India and London Life Assurance Company ..	..	ii. 1075, 1076
Dale v. Smithwick ..	..	34
— v. Taylor ..	..	ii. 1065
Dallas v. Floyd ..	..	ii. 736
Dalmer v. Dashwood ..	..	383, 385
Dalton v. Hayter ..	..	ii. 717, 718, 900, 901
— v. Lambert ..	..	ii. 1029
— v. Wilson ..	..	ii. 1044, 1049
Daly v. Kelly ..	..	ii. 916
— v. Nalder ..	..	ii. 894
Damer v. Portarlington ..	..	314, 319, 342, 435
Danby v. Danby ..	..	ii. 774
Daniel v. Russell ..	..	ii. 640
— v. Skipworth ..	..	515, ii. 897
— v. Trotman ..	..	151, ii. 627
Daniels v. Davison ..	..	573, 574
Danks, Exp. ..	..	ii. 792, 1013
Dann v. City of London Brewery Company ..	..	ii. 613
Dante ..	..	94, 98
Darby v. Wilkins ..	..	344
Darcy v. Callan ..	..	ii. 725
— v. Hall ..	..	ii. 930, 932
Daring ..	..	ii. 652
Darko v. Williamson ..	..	153, 516
Darkin v. Darkin ..	..	154
Darlow v. Cooper ..	..	321
Darvill v. Terry ..	..	50, 230
Dashwood v. Bithazey ..	..	515
— v. Blythway ..	..	ii. 1057
Daubigny v. Duval ..	..	290
Davenport, Exp. ..	..	533, 535
— v. Davenport ..	..	387
— v. James ..	..	505, ii. 1000
— v. Whitmore ..	..	63
Davey v. Durrant ..	..	489, 495, 496
Davies, Re ..	..	212, ii. 675
— Exp. ..	..	ii. 1082
— v. Acocks ..	..	231
— v. Bush ..	..	ii. 839
— v. Cracraft ..	..	417, 432
— v. Davies ..	..	569, ii. 1045
— v. Heath ..	..	ii. 1175
— v. Lowndes ..	..	159, 165, ii. 888
— v. Parry ..	..	246, 369
— v. Spurling ..	..	ii. 923, 924
— v. Thomas ..	..	561, 570, 576
— v. Topp ..	..	ii. 700
— v. Vernon ..	..	203, 308
— v. Williams ..	..	333
Davis v. Barrett ..	..	ii. 805, 818, 819, 930, 931
— v. Battine ..	..	321, ii. 839
— v. Bowsher ..	..	219, 220
— v. Chanter ..	..	ii. 899
— v. Dendy ..	..	ii. 954
— v. Dowding ..	..	517, ii. 1090
— v. Dysart ..	..	318
— v. Gardiner ..	..	ii. 701
— v. Duke of Marlborough ..	..	243, 244, 256, 383, 385, 400, 408, 416, 435
— v. May ..	..	ii. 958
— v. Parry ..	..	311
— v. Reynolds ..	..	ii. 851
— v. Strathmore ..	..	583
— v. Thomas ..	..	16
— v. Tollemache ..	..	ii. 598
— v. Trevanion ..	..	112, 115
— v. Whitmore ..	..	ii. 1029
Davoren v. Collins ..	..	ii. 930
Daw v. Terrell ..	..	35, 38
Dawes, Exp. ..	..	ii. 676
Dawkins v. Evans ..	..	338
Dawson, Exp. ..	..	225
— v. Raynes ..	..	431, 433, 434
Day v. Croft ..	..	425, 426
— v. Day ..	..	ii. 643, 998
— v. Gudgen ..	..	ii. 1031
Dean v. Davidson ..	..	ii. 773
— v. McGhie ..	..	464
— v. Whittaker ..	..	476
Deane v. Byrnes ..	..	147
Dearle v. Hall ..	..	539; ii. 640, 644
Dearman v. Wyche ..	..	349, ii. 992
Dease v. Reilly ..	..	426
Debenham v. Ox ..	..	249
De Bouchont v. Goldamid ..	..	260, 290
Deering v. Hibernian Banking Company ..	..	145
Decze, Exp. ..	..	200
De Fencheres v. Dawes ..	..	378
Deffell v. White ..	..	52
Defries v. Creed ..	..	412
Degg v. Osbaston ..	..	ii. 795
Degge, Exp. ..	..	ii. 702
De Guildier v. Depeister ..	..	94
Delabere v. Norwood ..	..	ii. 908, 1006
Delaney v. Fox ..	..	454
Delany v. Mansfield ..	..	414
Della Caines v. Hayward ..	..	405, 409
Demainbray v. Metcalfe ..	..	ii. 616, 732, 781
De Mattos v. Gibson ..	..	328, 463, 489
De Medewe, Re ..	..	ii. 799
Dendy v. Cross ..	..	310, 315
De Nicholls v. Saunders ..	..	440
Dent v. Dent ..	..	255, 288
Derby (Earl of) v. Duke of Athol ..	..	ii. 724
Derbyshire and Staffordshire Railway Company v. Bainbrigge ..	..	105
De Rochefort v. Dawes ..	..	ii. 700
De Sorbein v. Bland ..	..	ii. 828

	PAGE		PAGE
Detillin v. Gale ..	ii. 1000, 1002, 1011, 1015	Doe d. Blagg v. Steel ..	337
Devaynes v. Noble ..	146	— d. Bowdler v. Owen ..	309
— v. Robinson ..	264, 285	— d. Butcher v. Musgrave ..	257
Devereux v. Bradstreet ..	ii. 1051	— d. Butler v. Kensington ..	438
Dewdney, Exp. ..	526	— d. Caps v. Caps ..	335
Dewhurst, Exp. ..	219	— d. Cox v. Brown ..	338
De Winton v. Mayor of Brecon ..	261, 398, 415, 416; ii. 606	— d. Dixie v. Davis ..	448
Dibbs v. Goren ..	156	— d. Downe v. Thompson ..	451, 453
Dicas v. Stockley ..	201, 843	— d. Fisher v. Giles ..	443
Dick v. Butler ..	ii. 920, 921	— d. Garrod v. Olley ..	447
Dickenson v. Allsop ..	121	— d. Gibbons v. Pott ..	305
— v. Harrison ..	371	— d. Goodbelieve v. Beavan ..	258
Dickinson v. Burrell ..	236	— d. Goody v. Carter ..	449
— v. Kitchen ..	ii. 662	— d. Griffith v. Mayo ..	443; ii. 625, 871
— v. Shee ..	ii. 792	— d. Grimsby v. Ball ..	236, 237
— v. Teasdale ..	357, 364	— d. Harrison v. Leuch ..	337
Digby, Exp. ..	ii. 679, 681, 682	— d. Higginbotham v. Barton ..	443
— v. Craggs ..	ii. 984	— d. Holt v. Roe ..	ii. 1017
Dighton v. Withers ..	ii. 1008	— d. Hughes v. Bucknell ..	451
Dillon v. Ashwin ..	ii. 1029	— d. — v. Jones ..	475
— v. Cruise ..	362, 363	— d. Hurst v. Clifton ..	338
— v. Jones ..	248	— d. Jones v. Hughes ..	282
— v. Plaskett ..	392	— d. Kingston v. Kingston ..	113
Dimsdale v. London and Brighton Railway Company ..	460	— d. Levi or Levy v. Horne ..	439
Dinn v. Grant ..	142	— d. Lyster v. Goldwin ..	445
Diplock v. Hammond ..	81	— d. Marriott v. Edwards ..	441, 453
Dirks v. Richards ..	ii. 842	— d. Mercer v. Bragg ..	ii. 1175
Ditton, Exp. ..	ii. 630	— d. Mitchinson v. Carter ..	110, 258
Dixon v. Baldwin ..	ii. 861	— d. Morgan v. Bluck ..	472
— v. Gayfere ..	355; ii. 742, 835	— d. Morris v. Roe ..	313
— v. Muckelston ..	37; ii. 625, 871	— d. Myatt v. St. Helen's, &c. Railway Company ..	266, 268, 329
— v. Parker ..	14	— d. Newman v. Rusham ..	236, 236
— v. Peacock ..	ii. 952	— d. Norfolk v. Hawke ..	259
— v. Saville ..	ii. 760	— d. North v. Webber ..	453
— v. Smith ..	413, 419, 420	— d. Ogle v. Vickers ..	306
— v. Stansfield ..	184	— d. Orchard v. Clifton ..	338
— v. Wigram ..	336, 343	— d. Otley v. Manning ..	235
— v. Wrench ..	116	— d. Palmer v. Eyre ..	350
— v. Yates ..	186, 844	— d. Parry v. Hughes ..	452
Dobinson v. Hawks ..	ii. 785	— d. — v. James ..	235
Dobree v. Nicholson ..	ii. 886	— d. Parsley v. Day ..	445
— v. Schroder ..	174	— d. Pearson v. Roe ..	440
Dobson, Exp. ..	33	— d. Pitt v. Hogg ..	258
— v. Land ..	ii. 931, 933, 946, 947, 960, 1021, 1098	— d. Richards v. Lewis ..	269
— v. Lee ..	ii. 937	— d. Roberts v. Parry ..	460
— v. Lyall ..	92; ii. 650	— d. Robinson v. Allsop ..	ii. 653
Dodd v. Lydall ..	ii. 1042	— d. Roby v. Maisey ..	443
Doddington v. Hallet ..	147	— d. Rogers v. Cadwallader ..	452
Dodds v. Hills ..	565	— d. Roynance v. Lightfoot ..	4, 11, 438, 444
Doddsley v. Varley ..	186	— d. Scruton v. Snaith ..	ii. 1175
Dodson v. Wentworth ..	ii. 861	— d. Shewen v. Wroot ..	21
Doe v. Amery ..	121	— d. Simpson v. Brown ..	338
— v. Lightfoot ..	351	— d. — v. Bunn ..	338
— v. Nepean ..	ii. 773	— d. Snell v. Tom ..	447
— v. Ross ..	309	— d. Sweetland v. Webber ..	369
— v. Williams ..	356	— d. Tubb v. Roe ..	338
— d. Baddeley v. Massey ..	350	— d. Tunstill v. Bottrill ..	234
— d. Banks v. Booth ..	268	— d. Wheeler v. Gibbons ..	22
— d. Barney v. Adams ..	455	— d. Whitaker v. Hales ..	452
— d. Barstow v. Cox ..	448	— d. Wigan v. Jones ..	460, ii. 666

	PAGE
Edwards v. Jones ..	.. ii. 890, 1032
— v. Kennedy ..	.. 406
— v. Martin ..	320, 543, ii. 1050
— v. Scarsbrook ..	.. 226
— v. Scott ..	.. 589
— v. Southgate ..	.. 460
— v. Warwick ..	.. ii. 965
Edwin ..	.. 169, 170
Eenrom ..	.. 85
Eggington, Exp. ..	.. 535
Egremont v. Thompson ..	.. ii. 1015
Eidsforth v. Armstead ..	.. 282
Eland v. Baker ..	.. 265
— v. Eland ..	282, 561, ii. 622
Elder v. Maclean ..	.. ii. 643
Elephanta ..	.. ii. 882
Elisha v. Elisha ..	.. ii. 1062
Eliza ..	87, 99, ii. 1013
Ella A. Clark ..	.. 170
Ellershaw v. Magniac ..	.. ii. 858
Ellerthorpe, Re ..	.. ii. 1095
Ellice, Exp. ..	.. 288
Elliotson v. Knowles ..	.. 324
Elliott v. Cordell ..	.. 272
— v. Edwards ..	140; ii. 834, 835
— v. Merriman ..	.. 576, 579
Ellis, Exp. ..	.. ii. 1083
— v. Deane ..	.. ii. 897
— v. Griffiths ..	.. ii. 962, 1056
— v. Guavas ..	.. ii. 906
— v. Hunt ..	.. ii. 864
Ellis's Trusts, Re ..	.. 275
Ellison v. Elwin ..	.. 270
— v. Wright ..	.. ii. 1015, 1016
Elmer v. Creasy ..	.. ii. 935
Elmore v. Stone ..	.. ii. 845
Elpis ..	.. ii. 822
Elsay v. Lutyens ..	.. ii. 655
Elvy v. Norwood ..	ii. 616, 617, 618, 989
Emancipation ..	.. 9, 92, 93
Emery, Exp. ..	.. 215
Emmanuel v. Bridges ..	55, 322, 530, 531
Emmerton, Exp. ..	.. ii. 1012
Emmet v. Tottenham ..	241, 243, ii. 915
Empringham v. Short ..	419, 420, ii. 665
Endo v. Caleham ..	.. ii. 925
England v. Codrington ..	.. 13, ii. 1003
English and American Bank, Re ..	.. 533
Ennis v. Brady ..	.. ii. 1020
Eno v. Tatum ..	.. ii. 698
Ensforth v. Griffith ..	15, 16, ii. 723
Equitable Insurance Company v. Fuller ..	.. ii. 1010
Ernest v. Nicolls ..	.. 263
Esdale v. Oxenham ..	.. 139, 142
Espey v. Lake ..	.. 243
Espin v. Pemberton ..	552, 558, ii. 871
Essex v. Baugh ..	.. ii. 655
Ety v. Bridges ..	.. 546, ii. 643
Eugenie ..	.. ii. 652
Europa ..	.. 168, 172, 177
European Bank, Re ..	.. 219
European Central Railway Company, Re ..	.. ii. 1139

	PAGE
European, &c. Company v. Royal Mail, &c. Company ..	457, 462
Evans v. Bicknall ..	572; ii. 604, 870, 880
— v. Brembridge ..	.. ii. 834
— v. Brown ..	.. ii. 763
— v. Cockeram ..	.. ii. 694
— v. Elliott ..	451, 452, ii. 928
— v. Jones ..	230, 371; ii. 596, 599, 757, 883
— v. Judkins ..	.. ii. 793
— v. Kinsey ..	.. ii. 1003
— v. Mathias ..	.. 408
— v. Smithson ..	.. ii. 689
— v. Williams ..	.. 131, ii. 672
Evelyn v. Evelyn ..	.. ii. 682
— v. Lewis ..	.. 415, 416
— v. Templar ..	.. 235
Everard v. Poppleton ..	.. 114
Ewer v. Corbet ..	.. 287
Ewin v. Lancaster ..	.. ii. 832
Ewing v. Osbaldeston ..	.. 140, 142
Exeter Carrier's Case ..	.. 188
Exhall Coal Company, Re ..	.. ii. 627
Exton v. Greaves ..	.. ii. 769
— v. Scott ..	.. 15, 237
Eyre v. Barmester ..	.. 548, ii. 803
— v. Dolphin ..	565, 567, ii. 654
— v. Green ..	.. ii. 700
— v. Hanson ..	.. ii. 1052, 1053, 1054
— v. Hughes ..	.. ii. 923, 957
— v. M'Dowell ..	33, 136, ii. 666
— v. Woodsino ..	.. ii. 762
Eyton v. Denbigh, &c. Railway Company ..	.. 140, 329
— v. Knight ..	.. 800

F.

Fagg's Case ..	.. ii. 604
Fagg v. James ..	.. ii. 629, 719
Faircloth v. Gurney ..	.. 473
Fair Haven ..	.. ii. 946
Fairtitle v. Gilbert ..	.. 268, 439
Faith v. East India Company ..	191, 193
Faithful ..	.. 100
Faithfull, Re ..	.. 207
Falk v. Fletcher ..	.. ii. 850, 858
Falkner v. Equitable Reversionary Society ..	.. 495
Fall v. Elkins ..	.. 389
Farebrother v. Woodhouse ..	ii. 615, 638
Farhall v. Farhall ..	282, 283, 577
Farley, Exp. ..	.. 38, 39, ii. 1083
Farmer v. Curtis ..	ii. 765, 894, 899
— v. Giles ..	.. ii. 786
— v. Smith ..	.. 374, ii. 784
Farquhar v. Morris ..	.. ii. 963
Farquharson v. Balfour ..	.. 151, 152
— v. Seton ..	.. ii. 724, 922
Farrar v. Barraclough ..	.. 286, 289
Farrow v. Rees ..	561; ii. 816, 872
Faulkner v. Boulton ..	.. ii. 1061, 1105

	PAGE		PAGE
Faulkner v. Daniel ..	384; ii. 772, 811, 818, 895, 897, 898, 899, 955, 969, 1047	Fitzgerald v. Stewart ..	83, 423
Fahsset v. Carpenter ..	ii. 738	Fitzmaurices, In re, The ..	358
Fawcet v. Fothergill ..	ii. 770	Fitzwilliam (Earl) v. Price ..	ii. 946
Fawcett v. Gee ..	252	Flack v. Downing College ..	22
— v. Lowther ..	ii. 715, 772	— v. Longmate ..	347, ii. 794
Fawell v. Heelis ..	ii. 834	Flarty v. Odiam ..	254
Fearenside v. Derham ..	ii. 799	Fleetwood's Case ..	ii. 604
Fearon v. Bowes ..	ii. 865	Fleetwood v. Jansen ..	ii. 1059, 1061
Featherstone v. Fenwick ..	36, 509	Fleming v. Self ..	ii. 783, 784, 786
Fector v. Philpott ..	ii. 665	Flemming v. Page ..	582
Fee v. Cobine ..	ii. 942, 951	Fletcher, Exp. ..	404, 527, ii. 1005
Feise v. Wray 186; ii. 837, 850, 851		— v. Dodd ..	420, 431
Feistel v. King's College ..	257, 399	Flight v. Bentley ..	23
Fell v. Brown ..	ii. 765, 884, 894, 899	— v. Carnac ..	ii. 927
Feltham v. Clark ..	ii. 546; 646, 903	— v. Chambre ..	ii. 1106
Felton v. Ash ..	336	— v. Salter ..	472
Fencott v. Clarke ..	311	Flory v. Denny ..	23
Fenn v. Bittlestone ..	24	Flower, Exp. ..	81
Fentiman v. Fentiman ..	276	— v. Marton ..	ii. 801
Fenton v. Blackwood ..	ii. 946	Floyd v. Aldridge ..	21
— v. Pearson ..	ii. 850	Floyer v. Lavington ..	13
Fenwick v. Laycock ..	476	— v. Sherard ..	20
— v. Potts ..	37	Footner v. Sturgis 508, 511, ii. 1063	
— v. Reed ..	5, 12, 314, ii. 735	Forbes (Lord) v. Deniston ..	ii. 654, 655
Fereday v. Wightwick ..	144	— v. Hammond ..	379
Fergus, Executors of v. Gore ..	ii. 967	— v. Moffat ..	ii. 804, 805, 818
Ferguson v. Gibson ..	ii. 832	— v. Peacock ..	282
— v. Tadman ..	408	Ford, Exp. ..	300, ii. 1011
Feronia ..	170, ii. 651	— v. Ager ..	350
Ferrand v. Clay ..	495	— v. Earl Chesterfield ..	ii. 1009, 1010, 1028, 1033, 1107
Ferrars v. Cherry ..	563, 569, ii. 605	— v. Healy ..	492
Ferrers v. Ferrers ..	ii. 974	— v. Olden ..	ii. 722
— v. Stafford, &c. Railway Company ..	141	— v. Rackham ..	ii. 904
Ferris v. Mullins ..	37	— v. Tennant ..	ii. 893
Fetherstone v. Mitchell 149, 517, ii. 621		— v. Wastell ..	511, ii. 1055
Fewster v. Turner ..	ii. 1029	— v. White 580, 581; ii. 623, 654, 1030	
Field v. Megaw ..	82	Fordham v. Wallis 356, 357, 361, 367, ii. 743	
— v. Moore ..	ii. 681	Forrest v. Elwes ..	ii. 732, 955
— v. Sowle ..	273, 274	Forrester v. Leigh ..	ii. 687, 710
Filbee v. Hopkins ..	337	Forshaw, Re ..	202
Financial Corporation and Price, Re 478		Forster v. Thompson ..	ii. 742
Finch v. Brown ..	ii. 958	Forsyth, Re ..	ii. 922
— v. Brook ..	ii. 792	— v. Bristowe ..	866
— v. Newnham ..	ii. 771	Forth v. Duke of Norfolk ..	104
— v. Shaw ..	565, 572, 587, 589; ii. 709, 871, 877, 1054	— v. Simpson ..	199
— v. Earl of Winchelsea ..	ii. 663	Fosbrooke v. Walker ..	ii. 632
Fisher, Exp. ..	233	Foster v. Blackstone 541; ii. 640, 641	
— Re ..	231	— v. Cockerell ..	539, ii. 640
— v. Bridges ..	251	— v. Colby ..	191
— v. Dixon ..	28, 31	— v. Eddy ..	501
— v. Dudding ..	ii. 979	— v. Foster ..	382, 430, 432
— v. Miller ..	77, ii. 856	— v. Frampton ..	ii. 861
— v. Papanicholas ..	114	— v. Haggart ..	492
— v. Taylor ..	299	— v. Harvey ..	ii. 1081
Fishwick v. Lowe ..	ii. 889	— v. Hodgson ..	ii. 743
Fitch v. Jones ..	251	— v. Ker ..	ii. 717
Fitzgerald v. Burk ..	590	— v. Pearson ..	298
— v. Fauconbridge 544, 553; ii. 746, 750, 751		— v. Roberts ..	ii. 1001, 1074
— v. Rainsford ..	806	Fothergill v. Kendrick ..	ii. 595
		Foulger v. Taylor ..	51
		Fountaine v. Caine ..	ii. 1090

	PAGE
Fountaine v. Carmarthen Railway Company ..	264, 329, ii. 1138
Fowler v. Churchill ..	.. 119
— v. Davies ..	.. ii. 780
— v. Foster ..	.. 53
— v. Roberts ..	.. 480
— v. Scott ..	.. ii. 1098
— v. Wightwick ..	.. ii. 960
Fox, Re ..	.. ii. 707
Foxcraft v. Wood ..	.. 147, 214
Foxley, Exp. ..	.. 233
Foxon v. Gascoigne ..	.. 162
Frail v. Ellis ..	505, 509; 554, 564
France v. Campbell ..	.. 476
— v. Cowper ..	.. 342
Francesco v. Massey ..	.. 193
Francis, Exp. ..	.. ii. 1082
— Re ..	.. 529
— v. Francis ..	.. 211
— v. Grover ..	.. 362, 363
— v. Webb ..	.. 164
Franklyn v. Fern ..	14; ii. 716, 770, 887, 900, 1002
Franco v. Bolton ..	.. 248
Frankland, Re ..	.. 478
— v. M'Gusty ..	.. 299
Franklin v. Hosier ..	.. 198
— v. Neate ..	.. 64, 69, 70
Franklinski v. Ball ..	.. 455
Fraser v. Burgess ..	.. 150, 151
— v. Pendlebury ..	.. ii. 788
— v. Thompson ..	.. 229
— v. Witt ..	.. ii. 858
Fray v. Drew ..	.. ii. 779
Frazer v. Jones ..	587; ii. 627, 872, 1001
Freak v. Hearsey ..	.. ii. 906
Frederick v. Aynscombe ..	.. ii. 768
Free, Exp. ..	.. 535
— v. Hinde ..	.. 387
Freeman v. Appleyard ..	.. 293
— v. Butler ..	.. 318
— v. Edwards ..	.. 448
— v. Ellis ..	.. ii. 703
— v. Fairlie ..	.. 211
— v. Pope ..	.. 228, 230
Freemount v. Dedire ..	.. 78
Freen, Exp. ..	.. 299
Freme v. Brade ..	.. ii. 1073, 1074
French v. Baron ..	.. ii. 953
— v. French ..	.. 227, 230
Frere v. Hesse ..	.. ii. 606
— v. Moore ..	.. ii. 602
Freshney v. Carrick ..	.. 239
Fripp v. Chard Railway Company ..	398, 405
Friswell v. King ..	.. 201
Frith v. Cameron ..	.. 288
— v. Forbes ..	.. 185
Frosel v. Welsh ..	.. 21
Fry v. Chartered Bank of India ..	192
Fuentes v. Montis ..	.. 293
Fuller v. Benett ..	552, 554, 555
— v. Earl ..	.. 117
Fulthorpe v. Foster ..	.. 240

	PAGE
Furlong v. Howard ..	.. 209
Furness v. Caterham Railway Company ..	266, 329, 398, 514
Fury v. Smith ..	.. 42, ii. 657
G.	
Gabriel v. Sturgis ..	.. ii. 1029
Galam, Cargo ex ..	.. 100, 193
Galbraith v. Cooper ..	.. 542
Galby v. Selby ..	.. 331
Gale v. Burnell ..	.. 445
— v. Laurie ..	.. 174
— v. Lewis ..	.. 559
— v. Williamson ..	.. 231
Galton v. Hancock ..	.. ii. 700
Galway v. Butler ..	.. ii. 1022
Games, Exp. ..	.. 163, 165
Gammon v. Stone ..	.. ii. 1007
Garden v. Ingram ..	.. ii. 1077
Gardiner v. Griffith ..	331, 515
— v. Painter ..	.. ii. 614, 766
Gardner v. Blane ..	380, 392, 406
— v. Cazenove ..	.. 464
— v. Lachlan ..	545, 546
— v. London, Chatham and Dover Railway Co. ..	265, 329, 398, 514
— v. Townshend ..	.. 79
Garforth v. Bradley ..	.. ii. 999
Garland v. Garland ..	.. 404, 405
Garlick v. Jackson ..	.. ii. 962, 1056
Garmston v. Gaunt ..	.. 284
Garner v. Briggs ..	.. 120
— v. Hannynghton ..	.. 307
Garnett v. Armstrong ..	.. ii. 806
Garrard v. Frankel ..	.. ii. 628
— v. Lord Landerdale ..	364; ii. 890, 914
Garrett v. Evers ..	.. 346
Garth v. Ersfield ..	.. 235
— v. Howard ..	.. 66
— v. Thomas ..	.. 340
— v. Ward ..	.. 584, ii. 916
Gaslight Company v. Terrell ..	.. ii. 1139
Gaunt v. Taylor ..	.. ii. 672, 974
Gauntlet ..	.. 89, ii. 1013
Gausson v. Morton ..	.. 34, 261
Gay v. Cox ..	.. ii. 976
— v. Hall ..	.. 114
Gedye v. Matson ..	.. ii. 885
Geldard v. Hornby ..	.. ii. 1052, 1053, 1056
Gemmell, Exp. ..	.. 144
General Furnishing Company v. Venn ..	.. 53
General Iron Screw Collier Company v. Schurmann ..	.. 174
General Provident, &c. Company, Re ..	.. 262, ii. 879
General Rolling Stock Company, Re ..	.. 219
General South American Company, Re ..	.. ii. 879

	PAGE		PAGE
George v. Claggett ..	217	Gobe v. Carlisle ..	ii. 907
— v. Elston ..	167	Gobind Chunder Sein v. Ryan ..	294
— v. Evans ..	386	Goddard v. Complin ..	ii. 607, 925
— v. Milbanke ..	286	— v. Lethbridge ..	ii. 732
— v. Millbank ..	6	— v. Whyte ..	ii. 830
Georges v. Georges ..	183	Godfrey v. Chadwell ..	ii. 893
German Mining Company, Re ..	263	— v. Tucker ..	334, 471
Gerrard, Exp. ..	136	— v. Watson ..	ii. 941, 946, 950,
— v. Baker ..	ii. 795		953, 967, 979, 1015
— v. O'Reilly ..	553, 555	Godin v. London Assurance Com-	
Gibbes, Exp. ..	ii. 861	pany ..	215
Gibbins v. Eyden ..	ii. 700	Going v. Farrell ..	ii. 706
— v. Howell ..	410	Goldsmid v. Stonehewer ..	ii. 723, 909,
— v. Mainwaring ..	391, 402		910
Gibbon v. Gibbon ..	ii. 953	Goldsmith v. Russell ..	228, 229
— v. Strathmore ..	ii. 904	Gomme v. West ..	418
Gibbons v. Braddall ..	140, ii. 834	Gooch v. Haworth ..	419, 420
— v. Hooper ..	221	Good, Exp. ..	215
Gibbs v. Cruikshank ..	450	Goodall v. Gawthorne ..	ii. 778
— v. Flight ..	116	— v. Skarratt ..	362
— v. Ongier ..	ii. 712	— v. Skelton ..	ii. 859
— v. Pike ..	121, 123	— v. Wyet ..	345
Gibson's Case ..	ii. 796	Goodchap v. Weaving ..	211
Gibson v. Carruthers ..	ii. 847, 848, 857,	Goode v. Burton ..	139
	868	— v. Job ..	ii. 740
— v. Dickie ..	248	Goodhart v. Lowe ..	ii. 849
— v. East India Company ..	255	Goodman, Exp. ..	532
— v. Hewett ..	318	— v. Grierson ..	13, 15
— v. Ingo 62, 63, 562, 570, ii. 647		— v. Kine ..	ii. 929
— v. Jayes ..	245	Goodricke v. Taylor ..	232
— v. May ..	201, 202	Goodright d. Carter v. Straphan ..	272
— v. Nicoll ..	ii. 1029, 1107	— d. Humphreys v. Moses 234	
— v. Overbury ..	539, 573	— v. Moore ..	336
— v. Seagrim ..	ii. 704, 706	Goodtitle v. Bishop ..	341
Giffard, Exp. ..	ii. 834	— v. Morgan ..	ii. 594, 870
— v. Hort ..	ii. 888	— d. Green v. Notitle ..	336
Giffard's Case ..	583	— d. Leon v. Lonsdown ..	337
Gilbert v. Golding ..	ii. 1008	— d. Tatum v. Pope ..	341
Giles v. Grover ..	475, ii. 665	Goodwin v. Lee ..	ii. 693
— v. Nathan ..	485	— v. Waghorn ..	36
— v. Perkins ..	157, 218	Goodyero v. Lake ..	ii. 986
Gilkison v. Middleton ..	191	Gordon v. Ellis ..	299
Gill v. Continental Gas Company ..	116	— v. Gordon ..	ii. 762
— v. Downing ..	150	— v. Graham ..	ii. 613, 926
— v. Eyton ..	311, 313, 315	— v. Horsfall ..	520, ii. 717, 892
— v. Newton ..	491	Gore v. Bowser ..	471
Gillett, Exp. ..	ii. 1012	— v. Gardner ..	88, 90, 91
Gilpin v. Clutterbuck ..	250	— v. Harris ..	ii. 914
Girdlestone v. Lavender ..	ii. 1079	— v. Stacpoole 585; ii. 737, 888, 1059	
Girling v. Lowther ..	235	Gorgier v. Mieville ..	298
Gladstone v. Birley ..	10, 77, 102, 177,	Gosling v. Birnie ..	ii. 868
	189, 190, 193	Gossip v. Wright ..	16
— v. Padwick ..	230	Gotlieb v. Cranch ..	ii. 1073, 1076
Gladwyn v. Hitchman ..	320, ii. 981	Gough v. Bult ..	363
Glaholm v. Barker ..	175	— v. Everard ..	55
Glascott v. Day ..	ii. 793	— v. Offley ..	319
Gleaves v. Pain ..	ii. 1043	Gould v. Davis ..	165
Gledstanes v. Allen ..	192	— v. Robertson ..	324
Glossop v. Harrison ..	434	— v. Tancred ii. 935, 958, 959, 960	
Glover v. Hall ..	311, 812	Gouthwaite v. Rippon ..	498
— v. Rogers ..	ii. 1030, 1033	Gower v. Gower ..	ii. 805, 816
Glyn, Exp. ..	38	Grace v. Lord Mountmorris ..	896, 1006
— v. Baker ..	298	Graham v. Chapman ..	233, 234
— v. Hood ..	81	— v. Connell ..	116

	PAGE
Graham v. Dyster ..	290
— v. Furber ..	228
— v. Lee ..	258
— v. Walker ..	ii. 958
— v. Witherby ..	ii. 674
Grainge v. Warner ..	ii. 644
Grane v. Mitchell ..	340
Grant v. Humphery ..	198
— v. Mills ..	505, ii. 834
— v. Shaw ..	51
— v. Vaughan ..	68
Grantham v. Hawley ..	25
Grantley v. Garthwaite ..	22
Gratitudine ..	87, 88, 99
Graves v. Graves ..	288
— v. Hicks ..	ii. 681
— v. Wright ..	ii. 892
Gray v. Chamberlain ..	198
— v. Chaplin ..	378, 399
— v. Dowman ..	ii. 683, 1043
— v. Jones ..	51
— v. Mathias ..	247, 248
Great Pacific ..	93, ii. 649, 882
Greated v. Greated ..	ii. 697
Greathead, Re ..	150, 151
Greaves, Exp. ..	535
— v. Wilson ..	106
Green v. Attenborough ..	52
— v. Belcher ..	285
— v. Briggs ..	144, 465, ii. 648, 1004, 1027
— v. Farmer ..	198, 200
— v. Gray ..	ii. 1172
— v. Green ..	408
— v. Haythorne ..	ii. 852
— v. Ingham ..	539
— v. Nicholls ..	ii. 744
— v. Wynn ..	ii. 756, 815
Greenfield v. Edwards ..	561
Greening, Exp. ..	540
— v. Beckford ..	ii. 642
— v. Clark ..	239
Greenlaw v. King ..	ii. 1131
Greenough v. Sherlock ..	273
Greenslade v. Dare ..	544, 551
Greenway, Exp. ..	531
— v. Bromfield ..	392, ii. 993
Greenwood, Exp. ..	ii. 1082
— v. Churchill ..	562, ii. 626
— v. Firth ..	ii. 1047
— v. Rothwell ..	309, ii. 896
— v. Taylor ..	624, ii. 710, 824
Gregg v. Arnott ..	242, ii. 711
— v. Slater ..	ii. 1004, 1006, 1018
Gregory v. Pilkington ..	ii. 997
Gregson, Re ..	205
— v. Hindley ..	ii. 897, 905
Grenfell v. Commissioners of In-	
land Revenue ..	ii. 1178
— v. Dean and Canons of	
Windsor ..	257, 399
Gresley v. Adderley ..	381, 382, 393, ii. 927
— v. Mounsey ..	245, ii. 927

	PAGE
Greswold v. Marsham ..	583, ii. 807, 808, 891, 893
Greville v. Fleming ..	381, 383, 388
Grey v. Ellison ..	ii. 946
Greycoat Hospital v. Westminster	
Improvement Commissioners ..	470
Grice v. Shaw ..	ii. 816, 818
Griesbach v. Freemantle ..	541
Grievos v. Kirsopp ..	2
Griffin v. Bishop's Castle Railway	
Company ..	398
— v. Clowes ..	ii. 876
— v. Kyles ..	164
Griffith v. Griffith ..	408, 416, 436
— v. Ricketts ..	310, 541, ii. 776, 898
Griffiths, Exp. ..	ii. 823
— v. Griffiths ..	206, 207
— v. Hughes ..	122
— v. Hyde ..	179
— v. Perry ..	ii. 845
Grigg v. Sturgis ..	ii. 1029
Grimstone, Exp. ..	ii. 702, 761
Grindell v. Brendon ..	49
Gripper v. Bristow ..	112
Grosvenor v. Green ..	561
Grove, Exp. ..	182, 198
Groves v. Lane ..	322, ii. 899
Grugeon v. Gerrard ..	236, 322, 535, ii. 637, 719
Gnardner v. Boucher ..	369, 870
Gubbins v. Creed ..	241, ii. 945, 948, 952
Guest v. Cowbridge Railway Com-	
pany ..	107, 470, 471, ii. 609, 662
Guion v. Trask ..	301
Gumm v. Tyrie ..	464
Gunmer v. Adams ..	ii. 802
Gunn v. Bolckow ..	ii. 834
Gunter v. Gunter ..	ii. 815
Gurden v. Badcock ..	423, 492
Gurnell v. Gardner ..	81, 82
Gurney v. Behrend ..	ii. 852, 855
— v. Duckott ..	ii. 963
— v. Jackson ..	ii. 1031, 1102
— v. Seppings ..	326
— v. Sharp ..	214, 216
Gustaf ..	171, ii. 652
Gwillim v. Holland ..	ii. 805
Gwynne v. Edwards ..	ii. 709, 710
Gyde, Exp. ..	525
Gyles v. Hall ..	ii. 790, 999

H.

Hackett v. Snow ..	403
Hague v. Dandeson ..	142, 145, ii. 843
Haig v. Homan ..	23
Haigh, Exp. ..	36
— v. Frost ..	114
— v. Grattan ..	425
— v. Jagger ..	387
Haines, Exp. ..	529
Hakewell v. Webber ..	ii. 1103
Haldenby v. Spofforth ..	285

	PAGE		PAGE
Hale v. Allnutt	231, 232	Hardy v. Felton	497
— v. Cox	ii. 692, 694	— v. Reeves 354, 589; ii. 739, 743,	950
— v. Dale	114	Hare v. Horton	29
— v. Metropolitan Saloon Omni-		Harford v. Carpenter	36, 509
bus Company	53, 230	— v. Lloyd	154
Haley v. Hammersley	29, 30	Hargrave v. Hargrave 122, 126, 389	
Halkett, Exp.	85, 92	Hargreaves v. Rothwell	553, 555
Hall v. Dench	ii. 771	Harman v. Anderson	ii. 855
— v. Dewes	493	— v. Fisher	ii. 847
— v. Hurt	285	— v. Forster	ii. 811
— v. Laver	159, 209, ii. 900	Harmer v. Bell	168, 172, 176, 177
— v. Palmer	248	— v. Priestley	ii. 788, 1006
Halliday v. Holgate	68	Harper v. Faulder	ii. 872
Hallifax, Exp.	35	— v. Godsall	65, 458, ii. 757
— (Marquis of) v. Higgins		Harrington v. Price 306, ii. 870	
—	ii. 995, 996	Harriott, Re	153, 517
Halliley v. Kirtland	ii. 616	Harris, Exp.	50, ii. 822
Halliwell v. Tanner	ii. 701	— v. Birch	ii. 1176
Haly v. Barry	ii. 668	— v. Davison	471, ii. 768
Hamburg	86, 96	— v. Farwell	146
Hamburg, Cargo ex	96	— v. Hamlyn	ii. 1027
Hamerton v. Rogers	ii. 616	— v. Harris	ii. 985
Hamilton v. Brewster	436	— v. Pugh	104
— v. Denny	149	— v. Reynolds	214
— v. Leighton	413	— v. Rickett	231
— v. Royle	561, 569, 571	— v. Saunders	ii. 673
— v. Worley	ii. 687	— v. Shee	403
Hamlet, Re	ii. 1083	Harrison, Exp.	144
Hamlyn v. Lee	418, 419	— v. Boydell	432, 438
Hammersley v. Knowlys	ii. 798	— v. Duignan 355, 381; ii. 987,	992, 993
Hammond, Exp.	ii. 1081	— v. Forth	ii. 605
— v. Anderson	ii. 845, 863,	— v. Franks	485
—	864	— v. Guest	243
Hammonds v. Barclay	178, 215	— v. Hart	486, 488
Hampshire v. Bradley 496, ii. 1026		— v. Hollins	ii. 736
Hampson v. Fellows	446	— v. Jackson	300
Hampton v. Hodges	303	— v. Kennedy	ii. 922, 1098
— v. Spencer	ii. 925	— v. Matthews	371
Hanbury v. Lichfield	574, 580	— v. Owen	ii. 802
Hancock v. Att.-Gen.	518	— v. Paynter	476
— v. Hancock	ii. 1087	— v. Pennell	ii. 892
Hancox v. Abbey	ii. 692, 694	— v. Round	ii. 813
Handcock v. Handcock	ii. 1008	— v. Southcote	140
— v. Shaen	ii. 888	— v. Wiltshire	246
Handley v. Farmer	ii. 784, 786	Harold v. Whitaker	455
Hankey, Exp.	ii. 928	Harryman v. Collins	ii. 938, 1003
Hanman v. Riley	ii. 909, 1047	Hart, Exp.	164
Hansard v. Hardy	567; ii. 739, 1106	— v. Eastern Union Railway	
Hanson v. Derby	ii. 1061	Company	266, 371
— v. Keating	271	— v. Tulk	401
— v. Preston	ii. 887, 888	Hartland v. Murrell	283
— v. Reece	160, 164	Hartley, Exp.	ii. 708
Harborton (Lord) v. Bennett	ii. 832	— v. Burton	ii. 1065
Harcourt v. Knowell	ii. 604	— v. Hitchcock	460, ii. 840
Harding, Exp.	55	— v. Russell	ii. 769
— v. Crethorn	569	— v. Shanwell	478, 480
— v. Davies	ii. 792	Hartop v. Hoare	67, 68, 179
— v. Hall	413	Harvey, Exp.	528, ii. 823
— v. Harding	ii. 697	— v. Ashley	568
— v. Pingey	ii. 720, 729	— v. Clayton	ii. 915
Hardingham v. Nicholls 544, 579, 590		— v. Crickett	142
Hardwick v. Mynd	ii. 829	— v. Gilbard	125
Hardwicke, Exp.	ii. 1015		
Hardy, Exp.	182, 551		

	PAGE		PAGE
Harvey v. Mountague ..	583	Hennessy, Re ..	547, 548, 559
— v. Tebbutt ..	ii. 1003, 1059	Henry v. Smith 349; ii. 767, 979, 987,	991, 992
Haselfoot's Estate, Re ..	ii. 617	Henshall v. Matthew ..	115
Hassall v. Smithers ..	157	Hensmen v. Fryer ..	ii. 700
Hastings (Lord) v. Astley ..	ii. 747	Henson v. Blackwell ..	ii. 1073, 1075
— v. Beavan ..	116	Hepworth v. Heslop ..	ii. 827, 1009
Hate v. Snelling ..	ii. 1103	— v. Hill ..	ii. 697
Hatch v. Skelton ..	ii. 805, 814, 818	Hercy v. Ferrers ..	318
Hatchell v. Cremorne ..	ii. 875	Herman v. Dunbar ..	437
— v. Egglex ..	269	Hermann v. Hodges ..	2
Hatfield, Re ..	ii. 1014	Hero ..	93, 99
— v. Phillips ..	296	Herries v. Griffiths ..	331
Hathesing v. Laing ..	ii. 854	Herscy ..	88, 90
Hatton v. English ..	51	Heslop, Exp. ..	544
— v. Haywood ..	334, 513	— v. Metcalfe ..	206
Hawes v. Warner ..	ii. 695	Hesse v. Stevenson ..	579
— v. Watson ..	ii. 868	Hewer v. Cox ..	51
Hawker, Exp. ..	232, 234, 256	Hewison v. Guthrie ..	217, ii. 838
— v. Hallewell ..	251, 299	Hewitt, Re ..	ii. 1095
Hawkes v. Dunn ..	ii. 858	— v. Loosemore ..	548, 550, 557, 558; ii. 870, 871
Hawkins v. Chappell ..	ii. 772, 776	— v. M'Cartney ..	340
— v. Gardiner ..	ii. 1033	— v. Nanson ..	ii. 1080
— v. Gathercole ..	400, 415, 472	Heyman v. Flewker ..	293
— v. Perry ..	ii. 1024	Heyward v. Lomax ..	ii. 800
— v. Taylor ..	ii. 614	Hibbert v. Barton ..	114
— v. Woodgate ..	ii. 1076	— v. Cooke ..	288
Hawtry v. Butlin ..	54	— v. Hibbert ..	380
Haydon v. Kirkpatrick ..	ii. 809	— v. Jenkins ..	406
Hayes v. Bryerly ..	ii. 1103	Hichens v. Kelly ..	ii. 904
— v. Hayes ..	ii. 970	Hickes v. Cooke ..	241, 242, ii. 722
Hayley v. Bartlett ..	7	Hickling v. Bowyer ..	ii. 689
Hayman v. Dubois ..	ii. 707	Hickman v. Cox ..	233
Haymer v. Haymer ..	ii. 757	— v. Machin ..	451, ii. 928
Haymes v. Cooper ..	163	— v. Upsall ..	ii. 737
Haynes v. Forshaw ..	287, 577, 578, ii. 709	Hicks v. Gardner ..	ii. 994
— v. Foster ..	298	— v. Hicks ..	430
— v. Haynes ..	323	— v. Powell ..	ii. 653
Head v. Egerton ..	ii. 870	Hickson v. Collis ..	128
Heald v. Hay ..	255, 400	— v. Fitzgerald ..	ii. 1022
Heales v. M'Murray ..	ii. 937	Hiern v. Mill ..	553, 572
Heams v. Bance ..	ii. 616, 617	Higgins, Exp. ..	ii. 822, 823
Heap v. Jones ..	ii. 1030	—, Re ..	ii. 673
Heart of Oak ..	92, 95	— v. Frankis ..	ii. 636, 638, 1030, 1043
Heath v. Crealock 368, 440, 587, 589; ii. 629, 1078		— v. Joyce ..	245
Heathcoate, Exp. ..	35, 38, 526	— v. Sargent ..	ii. 963
Heathcote v. Hulme ..	ii. 997	— v. Scott ..	163
Heather v. O'Neill ..	ii. 750, 751	— v. Shaw ..	585, ii. 917
Heathorne v. Darling ..	99, 567	— v. York Building Company ..	471, ii. 927
Heatley v. Thomas ..	273	Higgins v. Burton ..	67
Hebe ..	90, 91, 92	Higgs v. Scott ..	440
Hedderley, Exp. ..	532	Hilbert, Exp. ..	420
Hodges v. Hedges ..	ii. 687	Hiles v. Moore ..	383, 384, 385, 391, 403, ii. 612
Heighington v. Grant ..	ii. 962	Hill v. Adams ..	ii. 901
Heinekey v. Earle ..	ii. 846, 859	— v. Browne ..	517; ii. 621, 982, 968
Heinrich v. Sutton ..	160	— v. Cowdery ..	259
Hele v. Lord Bexley ..	ii. 742, 927, 939, 941	— v. Edmonds 269; ii. 755, 885, 887, 1042, 1120	
Helgoland ..	86, 92, 94, 100	— v. Fox ..	253
Hellawell v. Eastwood ..	54		
Hempstead v. Hempstead ..	323		
Henley v. Stone ..	ii. 910		
Henn v. Conisby ..	ii. 795		

	PAGE		PAGE
Hill v. Manchester, &c. Water-works Company ..	372	Holford v. Yate ..	ii. 1052, 1053, 1054
— v. Maurice ..	276	Holland v. Baker ..	ii. 913
— Pottery, Re ..	305	— v. Clark ..	358
— v. Price ..	ii. 1025	— v. Smith ..	ii. 1073
— v. Simpson ..	578	Holles v. Wyse ..	ii. 994, 996
— v. Spencer ..	248	Hollingsworth v. White ..	50
— v. Stawell ..	358	Hollis v. Claridge ..	ii. 197, 198, 201, 203
Hills v. Parker ..	ii. 748	Holman v. Loynes ..	245
Hind v. Poole ..	493	Holmes v. Bell ..	373, 390, 401, 402, ii. 823
Hinde, Exp. ..	ii. 702	— v. Matthews ..	13
— v. Blake ..	ii. 937	— v. Penney ..	228, 230, 238
Hine v. Dodd ..	543, 580; ii. 655	— v. Turner ..	ii. 639, 1047, 1063, 1099
Hinton v. Galli ..	401	— v. Tutton ..	531
Hiorns v. Holtom ..	508, 550; ii. 876	Holms v. Powell ..	573
Hipkin v. Wilson ..	ii. 753	Holroyd v. Griffiths ..	179
Hipkins v. Amery ..	551, ii. 615	— v. Marshall ..	238
Hippesley v. Spencer ..	303	Holst v. Pownall ..	ii. 862
Hirsch v. Coates ..	479	Holt v. Dewell ..	545, 585
Hirst v. Hannah ..	113	— v. Kershaw ..	114
Hiscox v. Greenwood ..	197	— v. Mill ..	ii. 604, 925
Hitchcock v. Carew ..	368	— v. Murray ..	ii. 673
— v. Sedgwick ..	ii. 604	Holton v. Lloyd ..	ii. 938, 941
Hitchens v. Lander ..	ii. 900	Holyman, Exp. ..	ii. 1082
Hitchman v. Walton ..	443	Homan, Exp. ..	51, 53, 55
Hoare, Exp. ..	226	Homer v. Luff ..	482
— v. Parker ..	67	Honeycomb v. Waldron ..	ii. 656, 657
— v. Peck ..	ii. 743	Honner v. Morton ..	270
Hoare's Case ..	263	Hood v. Easton ..	ii. 905, 935, 949
Hobart v. Abbott ..	ii. 902, 907	— v. Hood ..	ii. 697
Hobby v. Nuell ..	180	— v. Phillips ..	ii. 813, 814, 816
Hobday v. Peters ..	274, ii. 932	Hoole v. Roberts ..	ii. 1016
Hobhouse v. Hollcombe ..	408	Hooper, Exp. ..	39, ii. 610
Hobson v. Bell ..	495, 497; ii. 644	— v. Cooke ..	ii. 950
— v. Murphy ..	396	— v. Eyles ..	147
— v. Shearwood ..	164, 407	— v. Gumm ..	58, ii. 877
Hoby v. Allen ..	269	— v. Ramsbottom ..	66, 307
Hockley v. Bantock ..	37	Hope v. Booth ..	516, ii. 834
Hodge, Exp. ..	ii. 964	— v. Hayley ..	26
— v. Att.-Gen. ..	518	— v. Liddell ..	209, 210, 310, 570
Hodges v. Croydon Canal Company ..	ii. 987, 993, 1007	— v. Winter ..	ii. 650
Hodgkin, Exp. ..	231, ii. 632	Hopewell v. Barnes ..	ii. 642
Hodgson, Exp. ..	33, 527; ii. 1082, 1083	Hopgood v. Ernest ..	ii. 869
— v. Deane ..	581	Hopkins v. Hopkins ..	ii. 889
— v. Hodgson ..	ii. 967	— v. Worcester and Birmingham Canal Company ..	398
— v. Loy ..	ii. 837, 847, 851	Hopkinson v. Forster ..	81, 82
— v. Shaw ..	ii. 831	— v. Rolt ..	ii. 613
Hodgson's Case ..	34	Hopper v. Conyers ..	155
Hodkinson v. Quinn ..	282	Horan v. Wooloughan ..	ii. 1021
Hodle v. Healy ..	ii. 789, 741, 743	Horlock v. Nugent ..	7
Hoffman v. Duncan ..	406	— v. Priestly ..	580; ii. 594, 873
Hogan v. Baird ..	ii. 1005	— v. Smith ..	ii. 959, 1015
Hoggard v. Mackenzie ..	179	Horn v. Baker ..	30
Hoghton v. Hoghton ..	369, ii. 818	Hornan v. Hague ..	ii. 1020
Holbird v. Anderson ..	230	Hornby, Exp. ..	ii. 889
Holcroft v. Manby ..	478	— v. Matcham ..	ii. 1100, 1102
Holden, Exp. ..	120	Horncastle v. Farran ..	ii. 838
— v. Hearn ..	40	Horne, Exp. ..	ii. 1011
Holderness v. Collinson ..	216	Hornsby v. Lee ..	270
— v. Rankin ..	239	— v. Miller ..	239
— v. Shackells ..	144	Horrocks v. Ledsam ..	ii. 884, 1006
Holding v. Barton ..	ii. 743	Horsfall, Exp. ..	213
Holford v. Burnell ..	ii. 720	Horton v. Hall ..	285

	PAGE
Horton v. Smith ..	.. ii. 811, 812
Hosken v. Simcock ..	.. ii. 1006
Hostiler's Case ..	181, 199, 487
Hotham v. Somerville ..	.. 126
Houghton v. Matthews ..	.. 184
Houlditch v. Collins ..	.. ii. 840
— v. Desanges ..	.. ii. 837
— v. Donegal ..	.. 401
— v. Milne ..	.. 198
— v. Wallace ..	.. 585
How v. Kirchner ..	.. 189, 191
— v. Vignres ..	.. 515, ii. 905
Howard v. Harris ..	ii. 730, 759, 982
— v. Robinson ..	.. 310
— v. Tucker ..	.. 192
Howarth, Re ..	.. 276
— v. Dean ..	.. 563, 591
Howcutt v. Bonser ..	.. 361
Howden, Exp. ....	.. 298
Howe v. Hunt ..	.. 450
Howell v. Price ..	5, 11, ii. 679
Howes v. Ball ..	.. 198, ii. 846
— v. Wadham ..	.. ii. 899
Howkins v. Bennet ..	.. ii. 1030
Hudson v. Carmichael ..	ii. 682, 684, 685, 686, 756
— v. Granger ..	.. ii. 215, 842
— v. Malcolm ..	.. ii. 1098
Hue v. French ..	.. 222, 227
Huggins v. Coates ..	.. 222
Hughes, Re ..	.. 540
— v. Cook ..	.. ii. 720
— v. Garner ..	.. 589
— v. Howard ..	.. 305
— v. Hughes ..	.. 407
— v. Kearney ..	.. ii. 834
— v. Kelly ..	.. ii. 987, 1028
— v. Lumley ..	.. ii. 671
— v. Mayre ..	.. 212
— v. Wells ..	.. 274, ii. 763
— v. Williams ..	363, 505; ii. 627, 662, 706, 944, 949, 998, 1107, 1124
— v. Wynne ..	.. ii. 978
Huguenin v. Baseley ..	.. 386
Hulkes v. Day ..	.. 117, ii. 642
Hull and Hornsea Railway Com- pany, Re. ....	.. 514
Hull v. Sharbrook ..	.. ii. 722
Hulme v. Tenant ..	.. 273, 274
Hulton v. Sandys ..	.. ii. 640
Humber Ironworks Company, Re ..	304, 531
Humberston, Re ..	.. ii. 857
Humble v. Humble ..	.. 352
Humfrey v. Gery ..	.. ii. 987
Humphrey v. Arabin ..	.. ii. 1073
Humphreys v. Harrison ..	.. 303
Hungerford, Re ..	.. ii. 1014
— v. Clay ..	.. 455
Hunoomanpersand Panday v. Mussumat Babooee Munraj Koonwersee ..	.. 100, 150
Hunt, Exp. ....	.. 38

	PAGE
Hunt v. Bateman ..	.. 363, 381
— v. Elmes ..	312; ii. 629, 871
— v. Fownes ..	.. ii. 898, 1016
— v. Gateler ..	.. ii. 596
Hunter and others, Re ..	.. 480
— v. Beal ..	.. ii. 861
— v. Langford ..	.. 2
— v. Leake ..	.. 311
— v. Lenthley ..	.. 310
— v. Maclew ..	.. ii. 885
— v. Nockolds ..	ii. 617, 618, 987, 988
— v. Pugh ..	.. 1027—8
— v. Walters ..	550, 587; ii. 871, 875
Huntingdon v. Greenville ..	ii. 601, 604
Huntington v. Huntington ..	ii. 682, 683, 748
Huntley ..	.. 94
Huntley v. Anglo-Californian, &c. Company ..	.. 206
Hurry v. Mangles ..	.. ii. 844
Hurst v. Hurst ..	507, 562; ii. 601, 621, 1033
Husband v. Davis ..	.. ii. 796
Huson v. Hewson ..	.. 339
Hussey v. Christie ..	95, 160, 182, 214
Hutchings, app. Nunes, resp. ..	.. ii. 867
— v. Smith ..	.. 270
Hutchins v. O'Sullivan ..	.. 352
Hutchinson v. Heyworth ..	.. 81, 84
— v. Joyce ..	.. 205
— v. Kay ..	.. 31
— v. Lord Massarene ..	.. 424
— v. Wright ..	.. 61
Hutton v. Bragg ..	.. 181, 190
— v. Crutwell ..	.. 231, 232
— v. Mayne ..	.. 519, ii. 1087
— v. Sealey ..	.. 507
Hyde v. Dallaway ..	.. ii. 786
— v. Johnson ..	.. ii. 740
— v. Price ..	.. ii. 975
Hylton v. Hylton ..	.. 243
I.	
Ibbetson v. Ibbetson ..	.. ii. 694
Ibbotson v. Rhodes ..	.. ii. 877
Ida ..	.. 90, ii. 881
Ihler v. Davies ..	.. ii. 1010
Ilchester v. Carnarvon ..	.. ii. 689
Imperial Mercantile &c. Asso- ciation v. London, Chatham and Dover Railway Company ..	.. 262
Imperial Salt and Alkali Com- pany, Re ..	.. 154
Incorporated Society v. Richards ..	.. ii. 940, 960
India ..	.. 171, 523
Inglis v. Underwood ..	.. ii. 866
Ingram v. Pelham ..	.. 561
Inman v. Clare ..	.. 219

	PAGE		PAGE
Inman v. Inman	ii. 623, 881	Jeff Davis	488
— v. Parsons	368	Jefferys v. Dickson ..	377, ii. 719
— v. Wearing	ii. 717, 721, 900, 1106	— v. Evans	247
Innes v. East India Company ..	479	— v. Smith	400
— v. Jackson	ii. 746, 748	Jenkin v. Row	14, 506, 619
Innisfallen	61, 464	Jenkins v. Briant	432, ii. 975
Inns of Court Hotel Company, Re	262	— v. Jones	490, 495
Insole, Re	270	— v. Perry	ii. 964
International Life Assurance Com- pany, Re	263, 268	Jenkinson v. Harcourt ..	ii. 682, 689, 693, 695
Irby v. Irby	ii. 616, 806, 1078	Jenkyn v. Vaughan	228, 230
Ireland v. Eade	414	Jenkyns v. Brown	ii. 858
Ireson v. Denn	ii. 632, 885	— v. Osborne	293, ii. 856
Irnham v. Child	14	Jenner v. Morris	307, 309
Iron Screw Collier Company v. Schurmann	174	— v. Tracy	ii. 742, 745
Irvin v. Ironmonger	ii. 700	Jennings v. Bond	584, 586
Irving v. Viana	159	— v. Moore	557
Isaack v. Clark	65	— v. Rigby	181, ii. 672
Isaacson v. Harwood	372	— v. Ward	ii. 731
Iale of Wight Ferry Company, Re	512	Jenny	97
Ismoord v. Claypool	ii. 1055	Jenny Lind	ii. 651
Izard, Exp.	231	Jerrard v. Saunders	587, 590
J.		Jersey (Earl) v. Briton ..	ii. 885
Jack v. Armstrong	ii. 656, 657, 658	Jervis v. Berridge	ii. 717
Jackman v. Mitchell	252	Jessopp v. Lutwyche	250
Jackson, Exp.	ii. 1013	Jewan v. Whitworth	294
— v. Brettall	ii. 1037	Jezeph v. Ingram	287
— v. Cummins	180	Joachim v. M'Donnall ..	ii. 1055
— v. Davison	252	Joel v. Dicker	114
— v. Innes	ii. 747, 748, 750, 754	John	87, ii. 647
— v. Langford	ii. 607, 609, 615, 616, 617	Johns v. French	ii. 892
— v. Nichol	ii. 859	— v. Simons	96
— v. Parker	ii. 752, 760	Johnson, Exp.	288, ii. 799
— v. Rowe	561	— v. Black	171
Jacob	87	— v. Bourne	ii. 933, 952
— v. Earl of Suffolk	ii. 935	— v. Burgess	514
Jacobs v. Latour	177, ii. 842	— v. Child	ii. 693, 700
— v. Richards	369	— v. Clarke	ii. 1109
Jacobson's Case	573	— v. Curtis	ii. 925
James, Exp.	ii. 932	— v. Diamond	479
— v. Bion	332, ii. 794, 1065	— v. Fesenmeyer	231, 232, 246, 370
— v. Ellis	255, ii. 1045	— v. Gallagher	274
— v. Griffin	ii. 847, 859	— v. Hill	187
— v. Harding	ii. 918, 1023	— v. Holdsworth	133, ii. 654, 655, 671, 890, 892
— v. James	510	— v. Jones	454
— v. Lichfield	573	— v. Kennett	282
— v. Oades	240	— v. Lasley	252
— v. Rice	35, 39, ii. 1104	— v. Royal Mail, &c. Com- pany	464, 465
Jameson v. Stein	ii. 811	— v. Shippen	85, 97
Jameson v. English	ii. 902, 921	— v. Thomas	ii. 916, 917
Jane	92, 93, 96, 100	— v. Webster	ii. 817, 819
James v. Whitbread	233	— v. Williamshurst	ii. 1004
Janet Wilson	ii. 946	Johnston v. Tucker	310
Janson v. Rany	591	Johnstone v. Stear	68
Jardine v. Leathley	373, 465	Joint Stock Discount Company, Re	531
Jauralde v. Parker	481	Jolland v. Stainbridge	ii. 655
Jay v. Warren	ii. 1172	Jolliffe, Re	ii. 1015
Jayne v. Hughes	350	Jolly v. Arbuthnot	443, 446, 447
Jebb v. Hodge	33	Jonathan Goodhue	9, 88, 99, ii. 651
		Jones, Exp.	33, 37, 40, 222, 526, 527
		—, Re	ii. 1024, 1085

	PAGE
Jones v. Bailey	508, 509, 511; ii. 676, 1080
— v. Binns	.. .. ii. 886
— v. Claughton	.. .. 419
— v. Cliff	.. .. ii. 733
— v. Creswicke	.. .. ii. 985, 1055
— v. East India Company	.. 256
— v. Farrell	.. .. 84
— v. Gibbons	.. 6, 542; ii. 653
— v. Griffith	368; ii. 636, 1047, 1064
— v. Harris	.. .. 51
— v. Jones	149, 284, 813, 319, 539, 540; ii. 684, 863, 864
— v. Kendrick	.. .. ii. 1059
— v. Lewis	.. .. ii. 1101
— v. Matthie	.. .. 489
— v. Medlicot	.. .. 37
— v. Morgan	.. ii. 810, 811, 815
— v. Owen	.. .. 449
— v. Pearle	.. .. 487, ii. 840
— v. Peppercorne	.. 181, 219
— v. Powles	.. .. ii. 605
— v. Pugh	.. .. ii. 912, 915
— v. Rhind	.. .. ii. 1029
— v. Roberts	.. .. 246, ii. 1054
— v. Smith	549, 550, 564, 565, 566, 570, 572; ii. 617, 630, 636, 639, 872, 884
— v. Starkey	.. .. 81, 82
— v. Tarleton	.. .. ii. 789
— v. Tarlton	.. .. ii. 842
— v. Thomas	.. .. 590
— v. Thompson	.. .. 479
— v. Thurloe	.. .. 487, ii. 840
— v. Tinney	.. .. 343, ii. 1086
— v. Turnbull	.. .. 163
— v. Williams	.. 38, 121, 122, 373, 550, 566
— v. Wyse	.. .. 258
Jordan v. Chowns	.. .. 338
Jortin v. South Eastern Railway Company	.. .. ii. 950
Jory v. Cox	.. .. 331; ii. 993, 994
Jourdaine v. Lefevre	.. .. 220
Joy v. Birch	.. .. 15
Joyce v. De Moleyns	587, 588; ii. 628, 629
— v. Joyce	.. .. ii. 892
— v. Williamson	.. .. ii. 882
Judd v. Green	.. .. 6
— v. Ollard	.. .. 369
Judson v. Etheridge	180, 197, 198
Juggoewundas Keeka Shah v. Ramdas Brijbookundas	.. 377
Julindur	.. .. 168
Justyn	.. .. 523
K.	
Kane v. Reynolds	.. .. ii. 1028
Karnak	.. .. 90, 91, 95, 98
Kay v. Johnston	.. .. 144, 147

	PAGE
Kay v. Smith	.. .. 243, 244
Kealy v. Bodkin	.. .. ii. 991
Keane, Re	.. .. 161
— v. Roberts	287, 576, 577
Keatinge v. Keatinge	.. .. ii. 1084
Kebell v. Philpot	.. .. 40
Keech v. Hall	443, 450, 452; ii. 767
Keeler, Re	.. .. ii. 1096
Kehoe v. Hales	.. .. ii. 839
Keightley v. Stockdale	.. .. 528
Kellock's Case	.. .. 531
Kelly v. Lord Bellew	.. .. ii. 985
— ? Keily v. Murphy	.. .. 434
— v. Staunton	.. .. 333
Kelsall, Exp.	.. .. 546
— v. Bennett	.. .. 567, 590
— v. Kelsall	.. .. ii. 1090
Kelsey v. Kelsey	.. .. 327, 332
Kemmis v. Stepney	.. .. ii. 829
Kemp v. Canavan	.. .. ii. 864
— v. King	.. .. 311
— v. Waddingham	.. .. ii. 672
— v. Westbrook	485; ii. 732, 744
Kendall, Exp.	.. .. 145
— v. Hulls	.. .. ii. 1099
Kenebel v. Scafton	.. .. ii. 826
Kennard v. Futvoye	.. .. ii. 727
Kennedy v. Green	.. 312, 550, 551, 556, 557, 558
—, petitioner, Whitney, respondent	.. .. 396
Kennerley Castle	.. .. 95
Kennett v. Westminster Improvement Commissioners	.. .. 480
Kenney v. Browne	.. .. 568
Kenny v. Clarke	.. .. 397
Kensington, Exp.	36, 38, 39, 215, 300, ii. 974
— (Lord) v. Bouverie	ii. 637, 718, 903, 935, 943, 970, 974
Kent Benefit Building Society, Re	265
— v. Riley	.. .. 230
— v. Thomas	.. .. ii. 796
Kepler	.. .. * ii. 1013
Kerford v. Mondel	.. .. ii. 789
Kern v. Deslandes	.. .. 192
Kerrick v. Saffery	.. 519; ii. 886, 889
Kerrison v. Cole	.. .. 222
— v. Dorrien	.. .. 236
Kershaw v. Kalow	.. .. 489, 495
Kerswill v. Bishop	.. .. 464
Kerr's Policy, Re	.. .. ii. 964
Kestrel	.. .. ii. 1035
Key, Exp.	.. .. 536
— v. Cotesworth	.. .. ii. 857
Keys v. Williams	.. .. 37
Keyser v. Suse	.. .. ii. 855
Kidd v. Rawlinson	.. .. 237
Kilmurry v. Geary	.. .. ii. 964
Kinderley v. Forbes	.. .. 424
Kinderley v. Jervis	284; ii. 667, 669
King, Exp.	.. .. 148
— v. Bromley	.. .. 18

	PAGE
King v. Heenan	488
— v. King .. 5, 13; ii. 679, 681	
— v. Lamb	ii. 604
— v. Leach	510, ii. 1049
— v. Marissal	ii. 768
— v. Marshall	267
— v. Martin	ii. 886
— v. Midland Railway Com- pany	ii. 1077
— v. Savery	243, 245
— v. Smith .. 303, 322; ii. 1023, 1024	
— (The) v. Bury	182
— v. Coombes	522, ii. 1048
— v. De la Motte 104; ii. 664, 1078	
— v. Hendon	21
— v. Humphrey .. 216, ii. 665	
— v. Lee	ii. 665
— v. Mildmay	21
— v. Sankey	201
Kingsford v. Poile	ii. 1056
— v. Merry	67
— v. Swinford	327
Kingston, Exp.	220
Kinloch v. Craig .. 178, 180, 186, 215	
Kinnoul (Earl of) v. Money .. 683, 684, 756, 757	
Kinsman v. Barker	ii. 924
— v. Kinsman	583, 585
Kirby v. O'Shee	ii. 942
Kirchner v. Venns	189, 191
Kirkham v. Smith .. 701, 810, 813, 1001	
Kirkman v. Shawcross	183
Kirkwall v. Flight	370
Kirkwood v. Thompson .. 488, 491; ii. 738	
Kirton's Case	ii. 777
Kirwan v. Daniel	83
Kitchen v. Irving	ii. 662
Kittier v. Raynes	532
Knapp v. Williams	398
Knebell v. White	ii. 719, 925, 984
Knight v. Bampffield	ii. 920
— v. Bowyer .. 363, 573; ii. 719, 720, 979	
— v. Bulkeley	255
— v. Davis	ii. 680
— v. Ferguson	229
— v. Knight	807
— v. Majoribanks	ii. 722
— v. Lord Plymouth	421
Knights v. Wiffen	ii. 868
Knott, Exp.	ii. 601, 602, 603, 607, 608, 610, 614, 615
Knowles v. Chapman	ii. 945, 967
— v. Spence	ii. 952
Knox v. Simmonds	ii. 789
— v. Turner	ii. 1073, 1074
Kruger v. Wilcox	ii. 843
Kuckein v. Wilson	290
Kymer v. Sawercroft	ii. 848

L.

	PAGE
Lacey v. Ingle	563; ii. 607, 611
Lackington, Exp.	ii. 1083
— v. Harrison	ii. 855
Lacon v. Allen	35
— v. Liffen	61, 234
— v. Mertins .. 149; ii. 945, 967	
La Constanca	ii. 711
Ladbroke v. Lee	63, 562, 567
Ladd, Exp.	148
Lady Durham	168
Laing v. Reed	264
Lainson v. Lainson	ii. 977
Lake v. Brutton	240, ii. 830
— v. Gibson	144
Lamb v. Attenborough	67, 293
— v. Orton	ii. 774
Lambe v. Jones	121
Lambert v. Robinson	188
— v. Rogers	310
Lancashire v. Lancashire .. 386	
— and Yorkshire Railway Company, Re	ii. 1014
Lancaster, Exp.	ii. 1073
— Canal Navigation Com- pany, Exp.	33
— v. Evors	ii. 682, 721, 973
Land v. Wood	ii. 1030
Landon v. Morris	387; ii. 917, 918
Lands Improvement Company v. Richmond	ii. 1156
Lanc v. Chapman	251
— v. Dighton	154, ii. 882
— v. Jackson	581, 587
Langdale v. Briggs	ii. 694
Langfort v. Tyler	ii. 848
Langham, Re	421
Langham's Trust	ii. 993
Langhorne v. Harland	ii. 669
Langley v. Headland	165, 166
— v. Earl of Oxford	578
Langmead's Trusts	143
Langridge v. Payne	348
Langstaff v. Meagoe	29
Langstaffe v. Fenwick	ii. 957
Langston, Exp.	36
Langton v. Horton	63, 64, 174, 546; ii. 646, 662, 666
— v. Langton	386, 519; ii. 827, 947, 948, 1001, 1019
— v. Waite	460
— v. White	486, ii. 935
Lann v. Church	169
Lanoy v. Athol	ii. 681, 704, 708
Lansdowne v. Lansdowne	ii. 791
Lant v. Crisp	ii. 1059, 1062
Larchin v. North Western Deposit Bank	51
Larios v. Bonany Y. Gurety	2
Larkins v. Paxton	ii. 673

	PAGE
Laslett v. Cliffe ..	348, ii. 1079
Latimer v. Batson ..	.. 237
—— v. Neato ..	311, 312, 317
Latouche v. Lord Dunsany ..	580,
—— ii. 654	
—— v. Lucan ..	.. 324
Latter v. Dashwood ..	.. ii. 958
Laurel ..	91, 93, 94, 97, 168
Lavender v. Blakstone ..	229, 235
Law, Exp. ..	.. 183
—— v. Bagwell ..	.. 362, 364
—— v. Glenn ..	.. 377, ii. 930
—— v. Hunter ..	.. ii. 934
—— v. Law ..	.. 249
—— v. London Indisputable Life	
Policy Company ..	474, ii. 1075
Lawless v. Mansfield ..	368; ii. 729, 924,
—— 925, 927	
Lawley v. Hooper ..	.. 20, 21
Lawrence v. Boston ..	.. ii. 1175
Iawrie v. Banks ..	146, 155, 214
Lawson v. Dickenson ..	.. 202, 204
—— v. Hudson ..	.. ii. 682, 695
—— v. Ricketts ..	.. 437
Lawton v. Newland ..	.. 374
Layard v. Maud ..	.. ii. 869
Lea v. Hinton ..	.. ii. 1073, 1074
Lea's Trust, Re ..	.. ii. 1095
Leader ..	.. 483
Leahy v. Dancer ..	.. ii. 899
Leake v. Beckett ..	.. 803
Learoyd v. Robinson ..	.. 295
Leatherdale v. Sweepstone ..	.. ii. 792
Leathes, Exp. ..	.. 95, 98, 528
Lechmere v. Clamp ..	ii. 1103, 1104,
—— 1105	
—— v. Lechmere ..	.. 79
Leadbitter v. Long ..	.. 505
Lee, Exp. ..	.. 182
—— v. Green ..	.. 581, ii. 672
—— v. Heath ..	.. ii. 1051
—— v. Howlett ..	.. 540, ii. 640
—— v. Rook ..	.. ii. 682
—— v. Vernon ..	.. 306
Leedham v. Chawner ..	.. 154
Leeds v. Wright ..	.. ii. 860
Leeming, Re ..	.. ii. 702
Lees, Exp. ..	.. ii. 1082
——, Re ..	.. ii. 1035
—— v. Refitt ..	.. 167
—— v. Waring ..	.. 415
—— v. Whiteley ..	.. ii. 1077
Leese v. Martin ..	.. 179
Legard v. Hodges ..	.. 78
Legg v. Evans ..	180, 476, 486;
—— ii. 841, 842	
—— v. Mathieson ..	.. 266, 304
Leghi, Re ..	.. ii. 1015
Legros v. Cockerell ..	.. ii. 1060
Leicestershire Banking Company,	
Exp. ..	.. 584
Leigh v. Lloyd ..	.. 287, 368
Leith v. Irvine ..	ii. 955, 956, 957, 983
Leith's Estate, Re ..	77, 102, 151

	PAGE
Leitrim (Lord) v. Enery ..	.. ii. 702
Leman v. Newnham ..	.. ii. 687
Lempriere v. Pasley ..	.. 179
Lench v. Lench ..	.. 79
Le Neve v. Le Neve ..	552, 557, 581, 590;
—— ii. 655	
Lenwick v. Potts ..	.. ii. 695
Leonard v. Baker ..	.. 237
Leslie, Exp. ..	.. 147
—— v. Leslie ..	.. ii. 997
L'Estrange v. L'Estrange ..	.. 254
Lett v. Morris ..	.. 81
Letts v. Hutchins ..	.. ii. 787
Lenchan v. M'Cabe ..	.. ii. 655
Leuckhart v. Cooper ..	.. 185
Levi's Case ..	.. 219
Levieson v. Lane ..	.. 299
Levy v. Barnard ..	.. 217, ii. 843
Lewes, Re ..	.. ii. 1024
—— v. Morgan ..	369; ii. 611, 923, 924,
—— 927	
Lewes' Trusts, Re ..	.. ii. 774
Lewis, Exp. ..	.. 55, 232
—— v. Davies ..	.. 313, 315
—— v. Duncombe ..	.. ii. 598, 988
—— v. John ..	.. ii. 1011, 1015, 1017
—— v. Lord Kensington ..	.. 114
—— v. Lord Zouche ..	423, ii. 903
—— v. Madocks ..	.. 155
—— v. Nangle ..	.. ii. 684, 894, 895
—— v. Poole ..	.. ii. 1044
—— v. Rees ..	.. 235
—— v. Tankerville ..	.. 115
Ley v. Barlow ..	.. 209
—— v. Ley ..	.. ii. 701
Leycester v. Logan ..	.. 174, 176
Lays v. Price ..	.. ii. 703
Lichfield (Earl) v. Bond ..	.. 252
Lickbarrow v. Mason ..	.. 487, ii. 852
Liddell v. Norton ..	.. 211, 314
Life Association of Scotland v.	
Siddal ..	.. 272
Lightbourne v. Swift ..	.. ii. 1059, 1060
Lightfoot v. Keane ..	.. 203
Lilford v. Powys-Keck ..	.. ii. 710
Lilley v. Barnsley ..	.. 197, 200
Lincoln v. Wright ..	.. 14
Linda Flor ..	.. 168
Linden, Exp. ..	.. 140
Lindon v. Sharp ..	.. 232, 234
Lindsay v. Gibbs ..	.. 63, ii. 648
Lingen v. Simpson ..	.. 144
Lingham v. Biggs ..	.. 239
Lippard v. Ricketts ..	.. ii. 964
Lipscomb v. Lipscomb ..	.. ii. 681, 700
Lister v. Baxter ..	.. 97
—— v. Payn ..	.. 214
—— v. Tidd ..	.. ii. 642
—— v. Turner ..	236, 510, ii. 1049
Litchfield v. Ready ..	.. 451
Litt v. Cowley ..	.. ii. 886, 867
Littleboy v. Spooner ..	.. 432
Littledale, Exp., Re Pearse ..	.. 33
Liverpool Borough Bank v. Turner ..	61

	PAGE
Liverpool Marine Company v. Wilson	ii. 647, 706
Livesey v. Harding	314, ii. 643
Living, Exp.	ii. 928
Llewellyn, Re	213
Lloyd, Exp.	38, 300, 529, 534
— v. Attwood	35, 37, 235, 556; ii. 605, 607
— v. Banks	538; ii. 640, 643
— v. Cheetham	255
— v. Davies	471
— v. Douglas	ii. 1040
— v. Guibert	86, 97, 98
— v. Johns	ii. 701, 888
— v. Jones	ii. 961
— v. Lander	ii. 715, 886
— v. Lloyd	259, ii. 596
— v. Mason	159, 412, ii. 839
— v. Passingham	386, 403
— v. Wait	312; ii. 716, 776
— v. Whittey	ii. 1049, 1080
Loaring, Exp.	ii. 834
Lochiel	90, 97
Lock v. Lomas	ii. 1029, 1031, 1107
Locke v. Evans	517, ii. 621
— v. Lomas	506, ii. 912
Lockott v. Cary	209
Lockey, Re	434
Lockhart v. Hardy	321, 326; ii. 693, 1057
Locking v. Parker	488, 497; ii. 738, 824
Lockwood v. Ewer	485, ii. 732
Lockyer v. Jones	ii. 791
Loder's Case	219
Lodge v. Lyseley	ii. 663
Loeschman v. Williams	ii. 859
Loftus v. Swift	ii. 968, 1004
Lomax v. Bird	ii. 716, 794
— v. Buxton	232, 233, 234
— v. Hyde	ii. 893, 946, 1016
— v. Lomax	ii. 695
London and Birmingham, &c. Bank, Re	ii. 838
London Chartered Bank of Australia v. Lempriere	274
London Joint Stock Bank v. Mayor of London	485
London Monetary, &c. Society v. Brown	ii. 1108
London & N. W. Railway Company v. Bartlett	ii. 862
London and Western Loan Company v. Chase	51
London and Westminster, &c. Company v. Drake	30
Long v. Bowring	ii. 900
— v. Clopton	ii. 931
— v. Harris	ii. 970
— v. Storie	472, 515; ii. 910, 1003, 1050
Longmate v. Ledger	248
Longuet v. Scawen	5, 12; ii. 735, 906
Lonsdale (Earl) v. Church	430
Loosemore v. Knapman	ii. 681

	PAGE
Lord Cochrane	88, 94, 96, 99
— v. Colvin	164
— v. Price	456
— v. Wormleighton	183, 206, 207, 208
Louisa Bertha	168, ii. 651
Loveridge v. Cooper	539, ii. 640
Lovering, Exp.	ii. 675
Lowe, Re	212, ii. 764
— v. Blakemore	531
— v. Morgan	ii. 911, 912
Lowndes v. Collins	ii. 965
— v. Davies	166
Lowther v. Carlton	553; ii. 608, 901
Lowthian v. Hasel	ii. 617
Loyd v. Mansell	ii. 1058
Lubbock, Exp.	ii. 974, 986
Lucas, Exp.	ii. 644, 646
— v. Comerford	23
— v. Dennison	ii. 733, 741
— v. Dorrien	179, ii. 855
— v. Nockels	191
— v. Peacock	118, 159
— v. Seale	518
Lucraft v. Hite	ii. 1100
Ludgater v. Channell	433
Ludlow v. Grayall	148
Lunn v. St. John	ii. 982
Lushington v. Price	340
— v. Sewell	ii. 688
Lutton v. Rodd	ii. 998, 999
Lutwich v. Attorney-General	ii. 887
Lutwich's Case	518
Lyddon v. Moss	246, 247
Lyde v. Hale	391
— v. Minn	78
Lyne v. Thompson	152
Lysaght (Lessee of) v. Cuneady	ii. 1175
— v. Westmacott	ii. 1044
Lyster v. Dolland	104

M.

Maanss v. Henderson	217
Macartney v. Graham	ii. 1023, 1100
Macclesfield v. Davis	318
— (Earl) v. Fitton	ii. 895, 921, 980
Machell v. Clarke	ii. 596
Mackay, Exp.	53, 527, 542
— v. Douglas	228, 230
Macken, Re	ii. 1016
Mackenzie v. Gordon	ii. 798, 806
— v. Robinson	381, 515
— v. Sligo and Shannon	121
Mackinley, Re	ii. 1009
Mackreth v. Symmons	140; ii. 884, 896, 837
Mackworth v. Thomas	ii. 978
Macleod v. Dawson	ii. 899
Macleod v. Buchanan	118
Macnee v. Gorst	294
Macrae v. Ellerton	ii. 837
— v. Goodman	ii. 931

	PAGE
Madden v. Kompster	179, 218, ii. 843
Maddocks v. Wren	.. ii. 937
Madonna d'Idra	.. ii. 651
Magdalena Steam Navigation Company, Re	.. 263
Magnay v. Edwards	.. 456
Magrath v. Hardy	.. 484
Maguire v. Allen	.. 391, 402
— v. O'Reilly	.. ii. 840
Mahon v. Dawson	.. ii. 1087
Maitland v. Backhouse	.. 243, 568
— v. Irving	.. 243
— v. Wilson	.. 591
Major v. Lansley	.. 273
— v. Ward	.. 492
Making v. Making	.. ii. 968, 970
Makins, Exp.	.. 154
Malcolm v. Charlesworth	.. 43, ii. 657
— v. Montgomery	.. 402
— v. O'Callaghan	.. 426, 427
— v. Scott	.. 82
Mallack v. Galton	.. ii. 1084, 1090, 1098
Malone v. Geraghty	322, 509, ii. 767, 890, 1003—4
Malpas v. Ackland	.. 563
Man v. Shiffner	.. 218
Mangles v. Dixon	.. ii. 921, 980
Manlove v. Bale	.. 14, 149; ii. 945, 967
Manly v. Hawkins	.. 382
Mann v. Forrester	.. 217
— v. Stemmett	.. 437
Manners v. Furze	.. 380
Manning v. Burges	.. ii. 790
— v. Chambers	.. 259
— v. Westerne	.. ii. 798
Manningsford v. Toleman	.. 38, ii. 625
Manser v. Dix	.. 495, ii. 765
Mansfield (Lord) v. Hamilton	.. 412
— (Earl) v. Ogle	.. 122, 363; ii. 720, 975, 978
Mant v. Leith	.. 154
March v. Lee	.. ii. 600, 602
Marcon v. Bloxham	.. ii. 631, 634
Margrave v. Le Hooke	.. ii. 617, 632
Marianna	.. ii. 881
Marine Mansions Company, Re	50, 267, ii. 1009
Marjoribanks v. Hovendon	551, 553, ii. 655
Marks v. Felman	.. 226
— v. Lahee	.. 197
Marks' Trust, In re	.. 315
Marples v. Hurtle	.. 50, 480
Marr v. Smith	.. 165
Marriott v. Anchor Reversionary Company	.. 463, 495—6
— v. Kirkham	.. ii. 909
Marrow, Re	.. ii. 1024
Marryatt v. Marryatt	.. 372
Marsack v. Reeves	.. ii. 1001, 1005
Marsh, Exp.	.. 300, ii. 1081
— v. Bathoe	.. 204
— v. Keith	.. ii. 771
Marshall, Exp.	.. 846

	PAGE
Marshall v. Cave	.. ii. 942, 950
— v. Crowther	.. ii. 969
— v. Lamb	.. 234
— v. M'Aravey	.. ii. 1047
— v. Shrewsbury	.. ii. 1106
Marsham v. Gray	.. ii. 1105
Marston v. Downes	.. 319
M'Arthur v. Seaforth	.. ii. 732
Martin, Exp.	.. 39, 528
— v. Baxter	.. ii. 1021
— v. Cotter	.. 561
— v. Francis	.. 165
— v. London, Chatham and Dover Railway Company	804
— v. Mitchell	.. ii. 748
— v. Reid	.. 64, 66, 486
— v. Sedgwick	560; ii. 645, 625
— v. Smith	.. 469
Martindale v. Booth	.. 237
— v. Smith	.. ii. 788, 847
Martinez v. Cooper	.. ii. 874
Martini v. Coles	.. 290
Marton, Exp.	.. 420
Martyn v. Blake	.. ii. 975, 976
— v. Kingsly	.. ii. 795
Mary Ann	85, 87, 92, 98, 169, 170; ii. 651, 711
Mary Caroline	.. 174
Mason v. Bogg	.. 531
— v. Broadbent	.. ii. 989
— v. Kiddle	.. 113
— v. Morley	.. 157, ii. 838
— v. Stokes Bay Railway Co.	198
— v. Wood	.. 49
Massey v. Banner	.. 422
— v. Johnson	.. ii. 722
— v. Sladen	.. 492
Massy v. Batwell	.. ii. 917
Masten v. Cookson	.. ii. 772
Masterman, Exp.	.. 33
Mather v. Fraser	.. 31, 54
Mathison v. Clark	.. 498, ii. 954
Matson v. Dennis	.. ii. 797
— v. Swift	.. ii. 787
Matterson v. Elderfield	.. ii. 786
Matthew v. Bowler	.. 140
Matthews, Re	.. 238
— v. Blackmore	.. 371
— v. Cartwright	.. ii. 610
— v. Feaver	.. 227, 229
— v. Gabb	.. 547, ii. 648
— v. Goodday	.. 508, 510
— v. Hanbury	.. 248
— v. Walwyn	6; ii. 921, 924, 980, 982
Matthey v. Wiseman	.. 484
Maugham v. Sharpe	.. 24
Maundrell v. Maundrell	ii. 602, 603, 604
Mannell v. Egan	.. 434
Maxfield v. Burton	.. ii. 606, 621
Maxwell v. Mountacute	.. 14
—, petitioner, O'Dell, respondent	.. 397
— v. Wightwick	.. ii. 1029

	PAGE		PAGE
May v. Roper	269	Meux v. Smith	ii. 880
Mayfield v. Burton	ii. 870	Meyerstein v. Barber	65, 66, 67
Mayhew v. Crickett	ii. 756, 830	Meynell v. Garraway	587
Mayon, Exp.	230	— v. Howard	ii. 679
Mayor, Exp.	229	Meyrick's Estate, Re	ii. 1095
M'Burnie, Exp.	229	M'Gregor, Exp.	ii. 1081
M'Carogher v. Whieldou	494	Michael v. Fripp	63
M'Carthy v. Goold	255, 397	Michelmores v. Mudge	270, 271
— v. Ilandaff	ii. 981	Middle Drainage Commissioners, Re	ii. 1014
M'Cluney v. Lemon	28	Middleton v. Dodswell	389
M'Comb v. —	318	— v. Fowler	188
M'Combie v. Davies	290, ii. 841	— v. Lord Onslow	252
M'Cormick v. Parry	262	— v. Magney	141, 148
M'Curdy v. Chichester	472	— v. Middleton	ii. 700
M'Donald v. Walker	493	Midland Counties Railway Com-pany v. Westcomb	ii. 1024
M'Donnell v. Walshe	ii. 940	Middleton (Lord) v. Elliot	966, 986, 998, 1000, 1017, 1022, 1023, 1098, 1100, 1101
M'Donough v. Shewbridge	519; ii. 717, 719, 765	Milbank v. Revett	389
M'Dowall, Re	517	Mildred v. Austin	ii. 767, 892
M'Ewan v. Smith	ii. 855	Miles, Re	288
Mead v. Hide	ii. 693	— v. Durnford	ii. 780
— v. Lord Orrery	287, 576, 577; ii. 922, 929	— v. Gorton	ii. 838, 844
Meaden v. Scaley	401, 406	— v. Langley	574
Mears v. Best	ii. 1081, 1090	Milgate v. Kebble	ii. 844
Medder v. Birt	ii. 725	Millard, Re	212
Medley v. Horton	ii. 806	— v. Harvey	149
Meek v. Bayliss	ii. 1176	— v. Magor	338, ii. 1016
Meeker v. Tanton	345, ii. 907	Miller, Exp.	528
Meer's (Sir Thomas) Case	ii. 982	— v. Attlee	159, 183
Meggott v. Mills	237	— v. Cook	241, 491
Melbourne v. Cottrell	ii. 1018	— v. Mynn	479
Meliorucchi v. Royal Exchange Assurance Company	145	— v. Race	68
Molland v. Gray	369, ii. 926	Millett v. Davey	ii. 940
Meller v. Woods	510, ii. 1049	Milliken v. Kidd	ii. 1075
Mellish v. Brooks	ii. 891, 993	Mills v. Ball	ii. 862, 868
— v. Mellish	ii. 974	— v. Banks	285
— v. Vallins	ii. 698	— v. Finlay	311
Mellor v. Lees	13, ii. 730	— v. Fowkes	ii. 798, 799
Menetone v. Gibbons	85	— v. Fry	409, 414
Menzies v. Lightfoot	ii. 613	— v. Oddy	309
Mercer v. Graves	167	Miln v. Walton	ii. 826
— v. Peterson	232	Milne v. Slater	ii. 692
Merewether v. Mellish	209	Milton (Lord) v. Edgworth	ii. 997
Merriman v. Bonner	ii. 1016	Minn v. Stant	ii. 904, 913
Merry v. Abney	552	Minot v. Eaton	368
Mertins v. Jolliffe	561, ii. 605	Minstrel Boy	99
Messer v. Boyle	511	Minton v. Kirwood	21
Mestaer v. Atkins	62	M'Intyre v. Connell	116
— v. Gillespie	63	Mitchell v. Duke of Manchester	407
Metcalfe v. Archbishop of York	78, 885	— v. Lee	480
— v. Campion	ii. 944, 945	— v. Scaife	192
— v. Pulvertoft	387, 416, 586; ii. 915, 916	M'Kenna, Exp.	102, 178, 299
Metropolitan Bank v. Offord	ii. 886	M'Lean v. Fleming	189, 190
— Society v. Brown	448	M'Leod v. Annesley	289, ii. 917
Metters v. Brown	492	— v. Buchanan	ii. 642
Meux, Exp.	ii. 874	— v. Drummond	287, 576, 577
— v. Bell	539, 545, 546, 560; ii. 640, 641	M'Neill v. Cahill	ii. 654
— v. Ferne	510, ii. 1048	M'Neillie v. Acton	287
— v. Howell	230	Moakes v. Nicholson	ii. 858, 860
— v. Jacobs	50, 54	Mocatta v. Murgatroyd	569, ii. 605, 806, 807, 808, 820, 877, 1003
		Moffatt, Exp.	487

	PAGE
Mogg v. Baker	231
Moir v. Mudie	206
Mold v. Wheatcroft	328
Molesworth v. Robins 10, 203, ii.	622
Molony v. Kernan	567, 591
Monday v. Monday .. 517, ii.	1090
Money v. Jorden	ii. 802
Monk v. Pomfret	ii. 900
— v. Whittenbury	293
Monkhouse v. Corporation of Bedford	391, ii. 985, 1054
Monro, Exp.	539
Montefiore v. Behrens	116, 259
Montesquieu v. Sandys	245
Montgomerie v. Bath	ii. 911
Montgomery, Re	427
— v. Calland	ii. 961, 998, 1004, 1007, 1020
— v. Donohoe	ii. 600, 942
Moody v. Matthews	305
— v. Spencer	201
Moore, Re	305
— v. Bennet	561
— v. Culverhouse	43
— v. Greg	23
— v. Jervis	ii. 648
— v. M'Namara	582
— v. Marquis Donegal	ii. 930
— v. Moore	ii. 698
— v. Painter	ii. 950, 951, 958
— v. Perry	509
— v. Ramsden	473
— v. Rowe	ii. 1045
Moores v. Choat	23
More v. Mayhew	590
Moreau v. Polley	271
Morescock v. Dickens	ii. 654
Moreland v. Richardson	328
Mores v. Conham	67, 461
Moretton v. Holt	125
Morewood v. South Yorkshire Railway Company	51, 223
Morgan, Exp.	526
— v. Evans	ii. 923
— v. Higgins	369, ii. 924
— v. Jones	ii. 993
— v. Lewes	ii. 923
— v. Mather	ii. 982
— v. Morgan	ii. 761
— v. Sandys	ii. 1041
Morland, Exp.	ii. 1083
— v. Isaac	ii. 1073
Morley v. Attenborough	503
— v. Bridges	ii. 1006, 1018
— v. Elways	ii. 722, 723, 1059
— v. Hall	ii. 1172
— v. Hay	ii. 848
— v. Morley	ii. 812, 910
— v. Saunders	ii. 970
Mornington v. Keene	78
— v. Wellesley	ii. 839
Morony v. O'Dea	241, 242
Morret v. Pask	ii. 600, 611, 614, 617, 930, 931, 932

	PAGE
Morret v. Western	ii. 893
Morrice v. Bank of England	ii. 672
Morris v. Elme	420
— v. Islip	ii. 961, 1007
— v. Manesty	116
Morrison, Exp.	164
— v. Glover	ii. 786
— v. Morrison 151, 152, 153, 517	63, 464
— v. Parsons	393
Morrogh v. Hoaro	164
Morse v. Cooke	ii. 595
— v. Williams	184, 218
Mortimore v. Mortimore	289
Morton v. Woods	447, 448
Moseley v. Cresseys, &c. Company 149	782, 783, 785
Mosley v. Baker	ii. 1011
Moss, Exp.	207, 208
—, Re	441, ii. 928
— v. Gallimore	487
— v. Townsend	36, 378
Mountford, Exp.	39, 554, 555
— v. Scott	221
Mouys v. Leake	536, 540
Mowbray, Exp.	ii. 706
Mower's Trusts, Re	264
Moye v. Sparrow	543, 565, ii. 605
M'Queen v. Farquhar	545
M'Turk, Exp.	179
Muir v. Fleming	ii. 837
— v. Jolly	940, 949, 951
Mulhellen v. Marum	ii. 940, 949, 951
Mumford v. Oxford, Worcester and Wolverhampton Railway Company	ii. 715
— v. Stohwasser 573; ii.	606, 622
Munns v. Isle of Wight Railway Company	516
Murphy v. Mead	ii. 952
— v. Sterne	850
Murray, Re	212
— v. Arnold	530
— v. Barlee	273, 274
— v. Earl of Scarborough	414
— v. Penkett	ii. 645
Murrough v. French	435
Murtagh v. Tisdall	ii. 920
Musket v. Cliffe	ii. 695
Mutton, Exp.	55
Mutual Loan Fund Association v. Ludlow	ii. 832
Myers v. United Guarantec, &c. Company	ii. 880, 1018
— v. Willis	465

N.

Nairn v. Prowse	ii. 834, 836
Nanfan v. Perkins	ii. 1055
Nanny v. Edwards	ii. 1052

	PAGE		PAGE
Nash, Re	ii. 1015	Nicholls v. How	ii. 604, 664
Natal Land, &c. Co. v. Good ..	ii. 655	—— v. Maynard	ii. 994
National Permanent, &c. Building Society, Re	263, 264	Nichols v. Clent .. ..	.. 179
Native Iron Ore Company, Re ..	ii. 879	—— v. Hart	ii. 851
Navulshaw v. Brownrigg	294, 295	—— v. Le Feuvre	ii. 848
Naylor v. Mangles	187, 216	—— v. Nichols .. .. .	.. 69
Neal v. Att.-Gen.	ii. 985	—— v. Short	ii. 723
Neale v. Bealing	409, 410	Nicholson v. Bower	ii. 860
—— v. Day .. .. .	.. 227	—— v. Chapman .. ..	.. 199
Neame v. Moorsom	ii. 816	—— v. Cooper .. .. .	.. 51
Neate v. Duke of Marlborough ..	103, 471, 511	—— v. Jeyes	ii. 1019
—— v. Latimer .. .. .	.. 311	—— v. Revill	ii. 796, 834
—— v. Pink .. .. .	.. 411	—— v. Tutin	ii. 953
Neath and Brecon Railway Company, Re .. .. .	.. 141	Nicolai Heinrich .. ..	.. 168, 199
Needham v. Johnson .. .. .	.. 57	Nightingale v. Lawson .. ..	.. 305
—— v. Smith .. .. .	.. 79	Nixon v. Hamilton .. ..	.. 557
Needler v. Deeble	ii. 893, 920, 923	—— v. Roberts .. .. .	.. 176
Neesom v. Clarkson	147; ii. 944, 961	Noad v. Backhouse	397, 402
Neill v. Morley .. .. .	.. 370	Noble v. Adams	ii. 860
Neish v. Graham .. .. .	.. 191	Noel v. Lord Henley	ii. 691, 692, 694
Nelson	88, 92, 93, 97, 98, 100	—— v. Noel	ii. 692
—— v. Booth	246; ii. 683, 960	—— v. Ward .. .. .	.. 318
—— v. London Assurance Company .. .. .	.. 145, ii. 642	Norbury v. Norbury .. ..	.. 288
—— v. Page .. .. .	.. ii. 696	Norcutt v. Dodd .. .. .	.. 227
Nepcan v. Doe .. .. .	.. ii. 774	Nordstjernen .. .. .	.. 523
Neptune .. .. .	.. 168, ii. 653	Norfolk Railway Company v. McNamara .. .. .	.. 373, ii. 823
Nesbitt, Exp.	201, 203	Norris v. Caledonian Insurance Company .. .. .	.. ii. 928
—— v. Tredinnick .. .. .	.. 306	—— v. Chamblres .. ..	.. ii. 724
Ness, Exp. .. .. .	.. 133	—— v. Le Neve .. .. .	.. 552
Nettleship, Exp. .. .. .	.. 39	—— v. Stuart .. .. .	.. 584
Neva v. Flood .. .. .	.. ii. 671	—— v. Wright .. .. .	.. 289
—— v. Pennell	43; ii. 632, 638, 659	Norrish v. Marshall	ii. 901, 902
New v. Swain .. .. .	.. ii. 844	Nortcliffe v. Warburton .. ..	.. 121
Newberry v. Colvin .. .. .	.. 190	North v. Gurney .. .. .	.. 189
Newbury v. Marten	ii. 1027, 1087	—— British Insurance Company v. Hallett .. .. .	.. 543, 559
Newcastle-upon-Tyne Marine Insurance Company, Re .. .. .	.. 571	—— Star .. .. .	.. 90, 92, 172
New Clydach, &c. Company, Re ..	268	—— West Bank, Exp. .. ..	.. 53
Newcomb v. Bonham .. .. .	.. ii. 730	Northey v. Lewis	ii. 865, 868
—— v. Burdon .. .. .	.. 155	Norton v. Cooper	ii. 949, 1004
New Eagle .. .. .	.. ii. 651, 653	—— v. Pritchard .. .. .	.. 472
Newenham v. Pemberton	271, 272	Norway .. .. .	.. ii. 789
Newland v. Watkin .. .. .	.. 472	—— v. Rowe .. .. .	.. 383
Newlands v. Paynter .. .. .	.. ii. 663	Norwich (Mayor of) v. Norfolk Railway Company .. ..	.. 263
Newling v. Abbott .. .. .	.. ii. 777, 951	—— and Norfolk Provident Society, Re Smith's Case .. .. .	.. ii. 784
Newman v. Anling .. .. .	.. ii. 974	—— Yarn Company, Re .. ..	.. 263
—— v. Baker .. .. .	.. ii. 950	Nostra Senora del Carmine .. ..	.. 98
—— v. Franco .. .. .	.. 261	Nosworthy v. Maynard .. ..	.. 515
—— v. Payne .. .. .	.. 245, 246	Nottley v. Palmer .. .. .	.. 276
—— v. Rook .. .. .	.. 109, 482	Novosielski v. Wakafield	ii. 1051
—— v. Selfe .. .. .	.. ii. 1080	Nowell, Re .. .. .	.. 117
—— v. Wilson .. .. .	.. ii. 698	Noy v. Ellis .. .. .	.. 345
Newsham v. Gray .. .. .	.. ii. 1034	Noys v. Mordaunt .. .. .	.. 345
Newson v. Thornton .. .. .	.. 290, ii. 856	Nugent v. Gifford .. .. .	.. 577
Newton v. Aldous	509, ii. 1048	Nunn, Exp. .. .. .	.. 525
—— v. Beck .. .. .	.. 308	Nuova Loaneese .. .. .	.. 96
—— v. Charlton .. .. .	.. ii. 830	Nutting, Exp. .. .. .	.. 539
—— v. Egmont .. .. .	.. ii. 885, 913	Nymph .. .. .	.. 177
—— v. G. J. R. Company	ii. 979		
—— v. Newton	588, ii. 625, 629		

		PAGE	
O.			
Oakes, Exp.	..	39,	301
O'Brien v. Lewis	..	ii.	839
— v. Mahon	..	ii.	941
Ocean	..	..	90
O'Connell v. Cummins	..	..	12
Ockenden, Exp.	..	..	200
O'Dea v. O'Dea	..	..	209
Ogden v. Battams	..	ii.	935, 955
Ogilvie, Re	..	..	514
— v. Jeaffreson	..	..	588
Ogle v. Atkinson	..	..	ii. 857
— v. Storey	..	203,	205
Ohrly v. Jenkins	..	ii.	1029
O'Kelly v. Bodkin	352, 353, 354,	ii.	991
Oldaker v. Retford	..	ii.	1090
Olive	..	..	483
Oliver, Re	..	..	526
— v. Woodroffe	..	110,	114
Olivier	..	..	96, 99
Olliver v. King	..	..	238
Ommaney, Exp.	..	ii.	1024
— v. Stilwell	..	..	ii. 775
O'Neal v. Mead	..	..	ii. 701
O'Neill v. Innes	..	..	ii. 1007
Only v. Walker	..	..	591
Onslow's Trusts, Re	..	116,	ii. 668
Onward	..	..	96
Onyon v. Washbourne	..	..	418
Opie v. Godolphin	..	307,	317
Oppenheim v. Russell	184, 200,	ii.	846,
		848,	849
Orby v. Trigg	..	..	ii. 731
Orchard v. Rackstraw	..	..	180
Ord v. Smith	..	..	ii. 735
— v. White	..	..	ii. 648
Orde v. Hemming	..	..	5, 12
Orelia	..	..	94, 99
Orford (Earl of) v. Albemarle	..	..	285
Oriental	..	..	96
— Hotels Company, Re	..	ii.	1009
Orme v. Wright	..	..	495
Ormerod v. Tate	..	159,	164, 165
Ormsby, Re	..	..	426
— v. Thorpe	..	..	ii. 890
Orrett, Exp.	..	..	35
Osborn v. Lea	..	..	ii. 878
Osborn's Trusts, Re	..	..	ii. 1093
Osborne, Exp.	..	..	ii. 784
— v. Harvey	..	..	402
Osbourne v. Fallows	..	..	ii. 911
Osmanli, The	..	..	85, 86, 90
Ossulston (Lord) v. Lord Yar-	..	..	mouth
—	..	..	ii. 982
Oswald v. Thompson	..	..	228
Otter v. Lord Vaux	..	..	ii. 809
Oursell, Exp.	..	..	179
Overend v. Overend	..	..	426
Owen v. Body	..	..	233
— v. Crouch	..	..	ii. 1017
— v. Dickenson	..	..	273, 274
— v. Flack	..	..	ii. 767
— v. Homan	..	..	381, 386
		P.	
Owen v. Knight	..	..	ii. 874
— v. Nickson	..	..	317
— v. Owen	..	..	ii. 601
— v. Williams	..	..	306
Oxenham v. Ellis	..	ii.	953, 963, 1056
— v. Esdaile	..	..	142
Oxford (Earl) v. Rodney	..	..	ii. 688
— &c. Hall Company, Re	..	..	531
— &c. Railway Company, Re	..	..	208
Oxwick v. Plumer	..	..	575, ii. 595
Pacific	..	..	168, 171
Paddon v. Bartlett	..	..	ii. 1175
Page, Re	..	..	ii. 1069
— v. Adam	..	..	282
— v. Cooper	..	285,	325, 505
— v. Linwood	..	..	ii. 943, 960
— v. Newman	..	..	ii. 963
Paget v. Wade	..	..	ii. 724
— v. Foley	..	..	ii. 987
Pain v. Smith	..	..	509, 510
Paine, Exp.	..	..	ii. 1043
— v. Edwards	..	..	343
— and Layton, Exp.	..	..	213
Palk v. Lord Clinton	325, 504, 505,	..	ii. 632, 717, 718, 765, 884
Pallister v. Mayor of Gravesend	..	..	222
Palmer v. Bate	..	..	256
— v. Karl of Carlisle	505,	ii.	912
— v. Hendrie	..	..	326
— v. Jackson	..	..	ii. 739
— v. Vaughan	..	..	400
— v. Wright	..	..	314
Palmer v. Dauby	..	ii.	759, 760, 761
Panama	..	..	96, 100
Panama, &c. Mail Company, Re	..	..	267
Pandoorung, &c. v. Balkrishnan, &c.	..	..	368
Pardoe v. Price	..	..	372
Pares, Re	..	..	ii. 703
Pargeter v. Harris	..	..	453
Parke, Exp.	..	..	449
Parker, Re	..	..	529
— v. Alcock	251,	ii.	719, 925, 942
— v. Bingham	..	..	ii. 673
— v. Blythmore	..	..	587
— v. Brooke	..	..	567, 568
— v. Butcher	..	ii.	786, 982
— v. Calcraft	..	..	ii. 937
— v. Carter	..	..	235
— v. Clarke	..	..	6, ii. 623
— v. Dunn	..	..	414
— v. Fuller	..	..	ii. 903
— v. Hills	..	..	ii. 748
— v. Housefield	508, 509,	ii.	1048
— v. Watkins	..	..	ii. 937, 946
Parkes, Exp.	..	..	ii. 835
Parkinson, Re	..	..	34
— v. Chambers	..	..	312
— v. Hanbury	491, 492,	ii.	923,
			943
Parmeter v. Todhunter	..	..	89, 95
Parnell v. Tyler	..	..	490

	PAGE		PAGE
Parnham's Trusts, Re ..	259	Pell v. De Winton ..	ii. 797
Parr, Exp. ..	300, 532	— v. Northampton, &c. Railway Company ..	516
— v. Applebee ..	ii. 661	Pelly v. Wathen ..	10, 201, 204, 354; ii. 622, 639, 720, 951, 1002, 1011, 1041
Parrott v. Sweetland ..	ii. 835	Pemberton, Exp. ..	180
Parry v. Wright ..	ii. 805, 806, 814	Pembroke v. Friend ..	ii. 696, 698
Parsons v. Groomer ..	119	Pendlebury v. Walker ..	252
— v. Westbrook ..	322	Pendleton v. Rooth ..	ii. 741
Parteriche v. Powlet ..	ii. 683, 685	Penfold, Exp. ..	ii. 986
Partington v. Woodcock ..	451	Pongelley, Exp. ..	517
Partridge v. Beer ..	443	Pennell, Exp. ..	ii. 824
— v. Foster ..	334	— v. Dawson ..	232
Patch, Exp. ..	548	— v. Deffell ..	143
— v. Ward 311, 815; ii. 1055, 1059		— v. Millar ..	ii. 1074
— v. Wild ..	ii. 959	— v. Reynolds 232, 233, 234	
Patent Bread Machinery Company, Re ..	247, ii. 879	Penner v. Jemmett ..	ii. 871
— File Company, Re ..	262, 265	Penny v. Watts ..	574, 575, 587
Paterson v. Long ..	571	Penrhyn (Lord) v. Hughes 504, ii. 971	
— v. Task ..	290	Pentland v. Stokes ..	581, ii. 654
Patten v. Thompson ..	ii. 855	Perez v. Alsop ..	ii. 844
Paul v. Birch ..	215	Perkin v. Stafford ..	ii. 1108
— v. Dudley ..	ii. 810	Perkins v. Baynton ..	ii. 691
Pawlett v. Attorney-General ..	ii. 715, 764, 887	— v. Bradley ..	209, 553, ii. 1028
Payne v. Compton ..	587, ii. 891	— v. Deptford Pier Company 268, 399	
— v. Hornby ..	143	— v. Walker ..	ii. 705
— v. Mayor of Brecon ..	222	Perrat v. Balland ..	310
— v. Mortimer ..	236	Perrin, Re ..	127
— v. Shadbolt ..	ii. 844	Perry, Exp. ..	35
Paynter v. Carew 342, 343, 413, 435		— v. Barker ..	ii. 1057
— v. James ..	191	— v. Great Ship Company ..	327
Peace v. Hains ..	ii. 801	— v. Holl ..	260
Peacock, Exp. ..	533	— v. Keane ..	509, 510
— v. Burt ..	ii. 605, 614	— v. Marston ..	ii. 739
— v. Evans ..	244	— v. Meddowcroft ..	15
Peake, Exp. ..	536, ii. 884	— v. Oriental Hotels Company 406	
— v. Gibbon ..	ii. 887	— v. Phelps ..	155
— v. Ledger ..	ii. 914	— v. Walker ..	325, ii. 948
Pearce v. Morris ..	ii. 1062, 1063	Perry-Herrick v. Attwood 237, ii. 874	
— v. Newlyn ..	580	Persse v. Persse ..	229
— v. Watkins ..	ii. 721, 1005	Petch v. Tutin ..	25, 27
Pearl v. Deacon ..	ii. 830, 833	Peter v. Nicolls ..	235
Pears v. Laing ..	358	— v. Russell ..	ii. 874
— v. Weightman ..	ii. 805	Peters v. Beer ..	183
Pearse, Exp. ..	35	Petit, Exp. ..	ii. 615
— v. Hewitt ..	ii. 717, 720, 721, 925	Peto v. Hammond ..	ii. 884, 1050
Pearson, Exp. ..	224	Petre (Lord) v. E. C. Railway Company ..	253
— v. Benson ..	246, 287	Pettat v. Ellis ..	ii. 804, 986
— v. Goschen ..	190	Petty v. Styward ..	ii. 797
— v. Pulley ..	ii. 921	Peyton, Exp. ..	ii. 1015
— v. Sutton ..	213	— v. Ayliffe ..	ii. 762, 780
Pease, Exp. ..	297	Phayre v. Perce ..	154
— v. Fletcher ..	383, 389	Phelps v. Prew ..	317
— v. Gloabec ..	ii. 852	Phené v. Gillan ..	ii. 947
— v. Jackson ..	ii. 1069	Phéné's Trusts, Re ..	ii. 773, 774
— v. Wells ..	114	Philby v. Hazle ..	246
Pedder, Exp. ..	ii. 1082	Philippine ..	161
Peek v. Larsen ..	192	Phillips, Exp. ..	ii. 702, 703, 762
Peers v. Baldwin ..	ii. 978	—, Re ..	ii. 1024
— v. Ceeley ..	ii. 1017	— v. Davies ..	ii. 1001, 1005
Pegg v. Wisden ..	15	— v. Dickson ..	ii. 831
Peira v. Peira ..	ii. 682	— v. Evans ..	312
Pelham v. Duchess of Newcastle ..	418		

	PAGE
Phillips v. Gibbs ..	.. 114
— v. Gutteridge ..	ii. 806, 1081
— v. Huth ..	.. 296
— v. Parry ..	.. ii. 699
— v. Phillips ..	.. 285, 591
— v. Redhill ..	.. 562
— v. Rodie ..	189, 190, 193
— v. Vaughan ..	.. ii. 930, 931
Phillipson v. Gatty ..	.. 289
Phipps v. Lovegrove ..	.. 546
Phoenix Life Assurance Company, Re ..	.. 204, ii. 800
Pickard v. Bretz ..	.. 51
— v. Sears ..	.. ii. 877
Pickering v. Ilfracombe Railway Company ..	.. 268, ii. 667
— v. Vowles ..	.. 306
Pickford v. Maxwell ..	.. ii. 851
Pickstock v. Lyster ..	.. 230
Piddock v. Brown ..	.. ii. 925, 926
Pigeon, Exp. ..	.. ii. 1012
Piggin v. Cheetham ..	.. 340
Pigot v. Cubley ..	.. 486
Pilcher v. Rawlins ..	.. ii. 606, 875
Pilkington v. Schaller ..	.. 23
— v. Stanhope ..	.. 344
Pincke, Exp. ..	.. 405
Pinhorn v. Souster ..	.. 446, 449
Pinkerton v. Easton ..	.. 162
Pinkett v. Wright ..	145; ii. 623, 645
Pinnock v. Harrison ..	197; ii. 804, 839
Piper v. Piper ..	.. ii. 696
Pitcher v. Hellier ..	.. 378, 402
Pitt v. Bonner ..	.. 432
— v. Pitt ..	ii. 683, 755, 816
— v. Snowden ..	.. 407
Place v. Fagg ..	.. 28, 31
Plaico v. Allcock ..	.. 200
Plant, Exp. ..	.. 145
— v. Taylor ..	.. ii. 601
Platt v. Sprigg ..	.. ii. 888
Playfair v. Cooper ..	.. ii. 969, 972
— v. Musgrove ..	.. 475
Playford v. Playford ..	.. ii. 757, 758
Playters v. Abbott ..	.. 284
Pledge v. Buss ..	.. ii. 830, 833
Plowden v. Hyde ..	.. ii. 754
Plumbe v. Fluit ..	548, 572, ii. 873
— v. Plumbe ..	.. ii. 721, 901
Plummer, Re ..	.. 523
Plumtre v. O'Dell ..	.. 203, 205
Pocock v. Lee ..	.. ii. 683
— v. Pickering ..	.. 114
Pockley v. Pockley ..	.. ii. 680
Poles' Trusts, Re ..	.. ii. 644
Polglass v. Oliver ..	.. ii. 791
Pollexfen v. Moore ..	.. ii. 710
Pomfret (Earl) v. Windsor ..	591;
	.. ii. 602, 622
Ponten v. Page ..	.. 515
Pontet v. Basingstoke Canal Company ..	.. 372
Poole, Exp. ..	.. 316
— v. Hobbs ..	.. 114

	PAGE
Poole v. Warren ..	.. 378
— v. Wood ..	.. 380
Pooley, Exp. ..	.. 33
— v. Budd ..	.. ii. 838
Pope v. Onslow ..	.. ii. 630
Popham v. Baldwin ..	.. ii. 655
Popple v. Prideaux ..	.. 575
Porcher v. Wilson ..	.. ii. 698
Portalis v. Tetley ..	.. 296
Porter v. Hubbard ..	.. ii. 921
Portmore (Lord) v. Morris ..	* .. 14
Portsmouth (Earl of) v. Lord Eftingham ..	.. 548, 573
Postle, Re ..	.. ii. 929
Postlethwaite v. Blythe ..	.. 309
— v. Tavers ..	.. ii. 1103
Pothonier v. Dawson ..	.. 485
Potter v. Commissioners of Inland Revenue ..	.. ii. 1175
— v. Edwards ..	.. 240
— v. Hyatt ..	.. ii. 839
— v. Nicholson ..	.. 114
Potteries, &c. Railway Company v. Minor ..	.. 331
Potteries, &c. Railway Company, Re ..	.. 329, 331
Potts v. Leighton ..	.. 414, 430
— v. Warwick, &c. Canal Company ..	266, 329, 398, 399
Poulton, Re ..	.. ii. 1094
Pounsett v. Humphreys ..	.. 164
Powell, Exp. ..	38, 527, ii. 1012
—, Re ..	.. ii. 1091
— v. Aiken ..	.. 328
— v. Dillon ..	.. 573
— v. Glover ..	.. ii. 932
— v. Roberts ..	.. ii. 717
— v. Trotter ..	.. ii. 951, 1004
— v. Wright ..	.. ii. 914
Powell's Trust, Re ..	.. ii. 978
Power v. Allen ..	.. ii. 1081
— v. Butcher ..	.. 217
Powis v. Corbet ..	.. ii. 617, 699
Powles v. Hargreaves ..	.. 218
Powney v. Blomberg ..	370, 505, ii. 792
Powseley v. Blackman ..	.. 444
Powys v. Blagrave ..	.. 404, 406
— v. Mansfield ..	.. ii. 1084
Praed v. Gardiner ..	.. ii. 831
— v. Hull ..	339, 341, 342
France v. Sympson ..	.. ii. 739, 743
Pratt v. Bull ..	.. 120
— v. Vizard ..	.. 204
Prebble v. Boghurst ..	.. 78
Prees v. Coke ..	.. ii. 962, 1056
Prescott v. Tyler ..	.. 510, 518
Preston v. Corporation of Great Yarmouth ..	.. 372, 399
— v. Tubbin ..	.. 553, 583
Prevost, Exp. ..	.. ii. 1082
Price, Exp. ..	.. 540
— v. Berrington ..	370, ii. 1003
— v. Blakemore ..	.. 154
— v. Bury ..	.. 510

	PAGE
Price v. Carver ..	ii. 1048, 1049, 1085, 1086
— v. Copner ..	.. ii. 736, 739
— v. Davies ..	.. ii. 1015
— v. Fastnedge ..	.. ii. 611, 616
— v. Great Western Railway Company ..	.. ii. 965, 993
— v. Lovatt ..	.. 221, 254
— v. M'Beth ..	.. ii. 1003
— v. Moulton ..	.. 373, ii. 822
— v. Price ..	.. ii. 1008
Prichard v. Fellows ..	ii. 826, 1009
— v. Wilson ..	.. 491
Priddy v. Rose ..	.. } ii. 648
Priest v. Parrot ..	.. 248
Prince George ..	86, 89, 90, 91, 95
— Regent ..	.. 87
— of Saxo Coburg ..	.. 88, 89
— of Walos Assurance Co. v. Harding ..	.. 263
Prior v. Penpraze ..	.. ii. 663
Priscilla ..	.. ii. 711
Pritchard v. Fleetwood ..	.. 386
— v. Roberts ..	.. 161
Probert v. Morgan ..	.. 79
Procter v. Cooper ..	571, 581, 583
— v. Nicholson ..	.. 188
Proctor v. Cowper ..	.. ii. 982
— v. Oates ..	.. ii. 742, 1105
Prodgers v. Langham ..	.. 236
Prole v. Soady ..	.. 270
Proper, Re ..	.. ii. 1097
Prosser v. Rice ..	.. ii. 606, 1069
Pryce v. Bury ..	38; ii. 827, 1025, 1063
Pryor v. Swaine ..	.. 113
Pulteney v. Keymer ..	.. 216
Purcell v. Woodley ..	.. 426
Purdew v. Jackson ..	.. 270
Purdie v. Millett ..	.. ii. 722
Putnam v. Bates ..	.. 357
Pye v. Daubuz ..	.. 34
Pyle v. Partridge ..	.. ii. 1176
Pym v. Bowreman ..	.. ii. 716
Pyne v. Eric ..	.. 165

Q.

Quarman v. Williams 119
Quarles v. Knight ..	.. ii. 1052
Quarrell v. Beckford ..	5, 384; ii. 723, 917, 961, 967, 997, 1003
Queen (The) v. Baker ..	.. 443
— v. Chambers ..	.. ii. 1011
— v. General Cemetery Company ..	.. ii. 1139
Queiroz v. Trueman ..	.. 290
Quin v. Gunn ..	.. 391

R.

	PAGE
Raba v. Ryland ..	.. 298
Rabone v. Williams ..	.. 217
Radcliff v. Salmon ..	.. ii. 1050
Radcliffe, Re ..	.. ii. 1021
— v. Eccles ..	.. ii. 1094
Radford v. Wilson ..	.. 590
Raffety v. King ..	.. ii. 736, 758
Raikes v. Hall ..	.. 323
Rakestraw v. Brewer ..	306; ii. 725, 734
Ramsbottom, Exp. ..	.. ii. 986
— v. Wallis ..	347, 348; ii. 765, 884
Ramsden v. Langley ..	.. ii. 946, 1010
— v. Lupton ..	.. 50
Rancliffe v. Parkyns ..	.. 569
Rand v. Cartwright ..	.. ii. 764, 765
Randal v. Cockran ..	.. 153
Randall v. Rigby ..	.. 371
Ranken v. E. & W. India Dock Company ..	.. 304
Rankin v. Harwood ..	.. 353
Raper v. Crystal Palace Railway Company ..	.. 516
Raphael v. Boehm ..	.. ii. 962
Ratcliff v. Davis or Davies ..	64, 374; ii. 732, 744, 781
Ravald v. Russell ..	.. ii. 737, 758
Ravenshaw v. Hollier ..	.. 78
Rawbone, Re ..	.. ii. 644
Rawden v. Shadwell ..	.. 251
Rawe v. Chichester ..	.. 306
Rawes v. Rawes ..	.. 408
Rawlings v. Sewell ..	.. 167
Rawlins v. Dalton ..	.. ii. 919
Rawlinson v. Moss ..	.. 205, 207
Rawson v. Eicke ..	.. 441
— v. Harrison ..	.. ii. 698
Ray v. — ..	.. 410
Raynor, Exp. ..	.. ii. 676
— v. Harford ..	.. 82
Rayson v. Adcock ..	.. 453
— v. Sacheverel ..	.. ii. 777
Read v. Burley ..	.. 198
— v. Dupper ..	.. 165
— v. Goldring ..	.. ii. 794
— v. Ward ..	.. 561
Reade v. Sparkes ..	.. ii. 1020
Reader, Exp. ..	.. 231
Reardon v. Swabey ..	.. ii. 1172
Rebecca ..	.. 85
Redearn v. Sowerby ..	.. 207
Redhead v. Welton ..	.. ii. 673
Redington v. Redington ..	.. ii. 682
Redmayne v. Forster ..	510, ii. 890, 1046
Redshaw v. Newbold ..	.. 518
Reed, Exp. ..	.. 233
— v. Freer ..	.. ii. 1026
— v. Langlois ..	.. 314
— v. Norris ..	.. ii. 932
— v. Williams ..	.. 569
— v. Wilmot ..	.. 237

	PAGE
Reeks v. Postlethwaite .. ii.	738, 740
Rees v. Berrington	ii. 880
— v. Coke	ii. 1102
— v. Parkinson .. ..	.. 321
Reese River, &c. Company v. Atwell .. ..	.. 228
Reeve v. Attorney-General ..	.. 518
— v. Hicks	ii. 736, 765
— v. Whitmore .. ..	.. 26, 27
Reeves v. Brymer	ii. 801
— v. Capper	64, 66, 67, 238, ii. 841
— v. Cox .. ..	.. 418
— v. Glastonbury Canal Company .. ..	.. 340
Reg. v. Hawkins .. ..	.. 311
Regina v. Inhabitants of Chawton ..	ii. 1050
— v. Robinson	ii. 830
— v. Salter	ii. 830
— v. South Devon Railway Company .. ..	.. 198
— v. Trafford	ii. 786
Reid, Exp.	ii. 1012
— v. Fairbanks .. ..	.. 25
— v. Hollinshead .. ..	.. 298
— v. Middleton .. ..	.. 408
Reliance .. ..	.. 98
Remer v. Stokes .. ..	.. 505
Remnant v. Hood	ii. 1010
Renvoize v. Cooper	ii. 1053
Revel v. Watkinson	ii. 969, 970, 971, 972
Reynal, Exp. .. ..	.. 535
Reynolds, Exp.	ii. 1012
— v. Jex .. ..	.. 193, 290
Reynoldson v. Perkins	ii. 888, 889, 1106
Rhadamanthe .. ..	.. 96
Rhodes, Exp. .. ..	.. 166, 536
— v. Buckland .. ..	.. 332, 490; ii. 765, 766
— v. Mostyn .. ..	.. 385, 392
— v. Moxhay .. ..	.. 323
Riccard v. Prichard .. ..	.. 81
Rice v. Linstead .. ..	.. 114
— v. Rice	ii. 620, 628, 869, 875
Richards, Exp. .. ..	.. ii. 1024
— v. Cooper .. ..	.. 509, ii. 902
— v. James .. ..	.. 50
— v. Johnston .. ..	.. 476
— v. Morgan	ii. 518, 950
— v. Platel .. ..	.. 210, 310
— v. Richards .. ..	.. ii. 778
— v. Symons .. ..	.. ii. 843
— v. Syms .. ..	.. ii. 801
Richardson, Exp.	541, 589, ii. 645
—, Re .. ..	.. 44
— v. Goss	185; ii. 848, 860
— v. Greaves .. ..	.. 480
— v. Horton	ii. 669
— v. M'Causland .. ..	.. 140
— v. Smallwood	230, 238
— v. Ward .. ..	.. 436

	PAGE
Richardson v. Younge	ii. 734
Richmond .. ..	.. 174
Richards v. Gledstones	543, 559
— v. Patterson .. ..	.. 121
Rider v. Jones	211; ii. 1003, 1026, 1028
— v. Wagner .. ..	.. ii. 680, 710
Ridgway v. Kynnersley	ii. 1028, 1033
— v. Lees .. ..	.. 199
— v. Newstead .. ..	.. 323
— v. Roberts .. ..	.. 85, 147, 388
Ridgways, Re .. ..	.. 288
Ridley v. Taylor .. ..	.. 298, 299
Ridout v. Earl Plymouth .. ..	.. 380
Rigall v. Foster .. ..	.. 265
Rigden v. Vallier .. ..	.. 144
Rigge v. Bowater .. ..	.. 424
Right d. Jefferys v. Bucknell ..	440, 594
Rigley v. Daykin	ii. 1018
Riley v. Croydon	ii. 759
Riscley v. Ryle .. ..	.. 477
Rising v. Dolphin .. ..	.. 113
Rivers v. Steele .. ..	.. 583
Robarts v. Jefferys	ii. 792, 998
Robert v. Price .. ..	.. 508
Roberts v. Ball .. ..	.. ii. 840
— v. Bell .. ..	.. 324
— v. Clayton .. ..	.. ii. 725
— v. Croft	35; ii. 625, 871
— v. Dixwell .. ..	.. ii. 761
— v. Hughes .. ..	.. ii. 1030
— v. Kuffin .. ..	.. ii. 923
— v. Matthews .. ..	.. ii. 795
— v. Williams .. ..	.. ii. 1004
— v. Wyatt .. ..	.. ii. 841
Robertson v. Lockie .. ..	.. 492
— v. Norris .. ..	.. 489, ii. 957
Robey v. Ollier .. ..	.. 82
Robins v. Goldingham .. ..	.. 206
Robinson, Exp. 38, 528; ..	ii. 1011, 1012, 1013, 1081, 1084
— v. Briggs	55, 563; ii. 605, 623
— v. Burbidge .. ..	.. 116
— v. Collingwood .. ..	.. 52
— v. Cumming	ii. 957, 976
— v. Davison .. ..	.. ii. 614
— v. Gee .. ..	.. ii. 685
— v. Hadley .. ..	.. 390
— v. Hedge .. ..	.. ii. 669
— v. Jago .. ..	.. 331
— v. Lowater .. ..	.. 282
— v. Macdonnell .. ..	.. 25
— v. M'Donnell .. ..	.. 238
— v. Nesbitt .. ..	.. 485, ii. 667
— v. Peaco .. ..	.. 476
— v. Ridley .. ..	.. ii. 952
— v. Walter .. ..	.. 187, 487
— v. Wood .. ..	.. 117
Robson v. Kemp .. ..	.. 215
— v. M'Creight .. ..	.. 474
Roch v. Cullen .. ..	.. ii. 989
Rochard v. Fulton .. ..	.. 540, 581
Rochfort v. Battersby .. ..	.. ii. 886

	PAGE
Sandon v. Hooper	246; ii. 946, 948, 950, 951, 1004, 1015
Sanger v. Sanger	.. 273
Sankey Brook Coal Company, Re	78, 267, 268
Sargeson or Serjeson v. Sealy	ii. 702, 969, 978
Sarjeson v. Cruise..	.. ii. 969
Saunders v. Dehew	.. ii. 606, 622
— v. Hawkins	.. ii. 771
— v. Leslie	.. 140, ii. 829
— v. Merryweather	.. .. 453
— v. Milsome	.. 372, ii. 822
— v. Richards	.. .. 286
Savery v. King	.. 243, 244
Savill v. Barchard..	.. .. 198
Saville v. Champion	.. .. 190
Savin, Re	.. .. ii. 974
Sawyer v. Goodwin	.. .. ii. 930
Sayers, Exp.	.. .. 157
— v. Whitfield	.. 150, ii. 955
Scaife v. Tobin	.. .. 193
Scales v. Baker	.. .. 154
Scarborough v. Lyrus	.. .. 95
Scarfe v. Morgan	177, 181, 198, 199, 460; ii. 789, 842
Searth, Exp.	.. .. 28
Schlenken v. Moxey	.. .. 309
Scholefield v. Heafield	517; ii. 898, 1085, 1090
— v. Ingram	.. ii. 958, 961
— v. Lockwood	161; ii. 684, 947, 959, 970
— v. Templer	.. .. ii. 803
Schoole v. Sall	.. 326, ii. 1102
Schotsman v. Lancashire, &c. Rail- way Company	.. ii. 849, 857
Schuster v. McKellar	.. .. ii. 854
Schweitzer v. Mayhew	.. .. 506
Scio	.. 163, 180, ii. 653
Sclater v. Cottan	.. .. ii. 1015
Scotland (Bank of) v. Christie	.. 300
Scott, Exp.	.. .. ii. 929
— v. Becher	.. .. ii. 682, 689
— v. Colburn	.. .. 261
— v. Franklin	.. .. 220
— v. Lord Hastings	.. .. ii. 668
— v. Nesbitt	.. 150, 151, 152
— v. Newington	.. .. ii. 841
— v. Nicol	.. .. ii. 905
— v. Pettit	.. .. ii. 860, 861
— v. Platel	.. .. 429
— v. Roberts	.. .. 518
— v. Scholey	.. 104, 470
— v. Surman	.. .. 157
— v. Tyler	.. 576, 577, 578
— v. Walker	.. .. 317
Scrafton v. Quincey	.. .. ii. 657
Scurfield v. Gowland	.. .. 222
Seabourne v. Powell	.. .. ii. 596
Seaforth (Lord), Exp.	.. .. 525
Seagrave v. Pope	.. .. ii. 782, 1106
Seaman, Exp.	.. .. 163
Searle v. Colt	.. .. 331

	PAGE
Searle v. Lane	.. .. 583
— v. Law	.. .. 309
Seaton v. Simpson	.. .. 328
— v. Twyford	.. .. ii. 729
Selby v. Cooling	.. .. 286
— v. Pomfret	.. .. ii. 632, 639
— v. Selby	.. .. ii. 710
Self v. Madox	.. .. 582
Sellick v. Smith	.. .. 443
Selsey (Lord) v. Lord Lake	.. .. ii. 814
Semple v. Nicholson	.. .. ii. 1122
Senhouse v. Earl	309, 310, 314, 508, ii. 723
Sentance v. Porter..	.. .. ii. 1007
Serafina	.. .. 90
Serle v. St. Eloy	.. .. ii. 693, 694
Seton v. Slade	.. .. 11, ii. 996
Sevier v. Greenway	.. .. 14
Servaji Vijaya, &c. v. Chinna Nayana Chetti	.. .. ii. 735
Seymour v. Lucas	.. .. 258, 259
Shackel v. Duke of Marlborough	387
Shackleton v. Shackleton	.. .. ii. 1021
Shadforth v. Temple	.. .. 541
Shafto v. Adams	.. .. 244
— v. Shafto	.. .. ii. 687
Shalcross v. Dixon	.. .. ii. 705
Shank, Exp.	.. .. 199
Sharp v. Earl of Scarborough	.. .. ii. 767
— v. Key	.. .. ii. 929
Sharpe, Re	.. .. 212
— v. Foy	.. .. ii. 601, 621, 880
— v. Gibbs	.. .. ii. 822
Sharples v. Adams	.. .. ii. 606
Sharpnell v. Blake	.. .. ii. 788, 790, 999
Sharshaw v. Gibbs	576; ii. 952, 970
Shaw, Exp.	.. .. 182, 211
— v. Bunny	.. .. 491
— v. Foster	.. .. 37
— v. Hardingham	.. .. ii. 909
— v. Jeffry	.. .. 15
— v. Johnson	364; ii. 601, 988, 989
— v. Murtagh	.. .. ii. 940
— v. Neale	.. 122, 128, 160; ii. 611, 879
— v. Pritchard	.. .. 472
— v. Rhodes	.. .. 414, 430
— v. Shore	.. .. 391
— v. Simpson	.. .. 153, 517
— v. Wright	.. .. 436
Shearman v. British Assurance Co.	150
Shears v. Jacob	.. .. 52
— v. Rogers	.. .. 222, 230
Sheffield, Corporation of, Exp.	.. .. ii. 1015
— v. Duchess of Bucks	.. .. ii. 1086
— Union Banking Company, Exp.	.. .. 35
Sheldon v. Cox	.. .. 553, ii. 655
Shelly v. Pelham	.. .. 409
Shelmardine v. Harrop	.. .. ii. 1101
Shephard v. Eliot	.. .. ii. 958
— v. Beane	.. .. ii. 712
Shepherd v. Gwinnet	.. .. ii. 894

	PAGE		PAGE
Shepherd v. Titley	39, 321; ii. 607, 611, 613, 615	Slade v. Rigg	506, 509, 515, ii. 890
Shepley v. Davis ..	.. ii. 860	Slater v. Lawson ..	.. 357
Sheppard, Exp. ..	525, 533, ii. 1011	— v. Mayor of Sunderland	.. 166
— v. Union Bank of London	.. 294, 295	— v. Pinder ..	.. ii. 675
Sherborne v. Tollemache	109, 327	Sligo v. O'Malley ..	.. 393
Sherman, Exp. ..	.. 527	Slim v. Croucher ..	.. ii. 878
— v. Cox ..	.. ii. 920	Slipper v. Tottenham	.. 259
Sherrington, Exp. ..	.. 536	Sloane v. Mahon ..	.. ii. 621
Sherwood v. Clark ..	.. 469	— v. Packman ..	.. 221
Shewell v. Jones ..	.. 428, 429	Slubey v. Heyward ..	.. ii. 862
Shewen, Doe d., v. Wroot	.. 21	Smale v. Burr ..	.. 50
Shirley v. Martin ..	.. 249	Small v. Moates ..	.. 192, 193
— v. Watts ..	.. ii. 768	Smart, Exp. ..	.. 219
Shoobridge v. Wood ..	.. ii. 943	— v. Bradstock ..	.. ii. 914
Shotholt v. Biscow ..	.. 324	— v. Hunt ..	.. ii. 739, 942
Shower v. Payne ..	.. 255	— v. Sandars ..	.. 261
Shrewsbury (Countess) v. Earl		Smartle v. Williams ..	.. ii. 926
Shrewsbury	285; ii. 810, 811	Smeathman v. Bray ..	.. ii. 639
Shropshire Union, &c. Co. v. The		Smeeton v. Collier ..	.. 336, 339
Queen ..	.. 33, ii. 623	Smith, Re ..	.. 206, 207, 497
Shrubsole v. Sussams	231, 233, 234	—, Exp. 35, 232, 301; ii. 929, 950,	
Shuttleworth v. Hernaman	.. 80	1012, 1014, 1082	
— v. Laycock ..	.. ii. 630	—, Re Gye ..	.. 39
— v. Lowther ..	.. ii. 1006	—, Re Hildyard	36, 38, 39
Sichel v. Mosenthal ..	.. 2	—, Re Mannings	.. 7
Sichell v. Raphael ..	.. 84	— v. Aykwell ..	.. 248
Sidney v. Ranger ..	.. ii. 1081	— v. Baker ..	.. 595, ii. 770
Siebert v. Spooner ..	.. 232	— v. Bank of N. S. Wales	92, 99
Siffken v. Davis ..	909, 910, 1027, 1090	— v. Barnes ..	.. 312
— v. Wray ..	.. ii. 847, 850	— v. Bicknell ..	ii. 906, 1100, 1101
Sikes, Exp. ..	.. ii. 1011	— v. Boucher ..	.. ii. 1105
Silberschildt v. Schiott ..	.. ii. 1060	— v. Bowles ..	.. ii. 856
Silcock v. Roynon ..	ii. 1029, 1107, 1108	— v. Brocklesby ..	.. 166
Sillick v. Booth ..	.. ii. 774	— v. Brunning ..	.. 248
Simmonds v. Great Eastern Rail-		— v. Cannan ..	.. 232
way Company ..	.. 207	— v. Cheese ..	.. 51
Simms v. Brutton ..	.. ii. 796	— v. Cherrill ..	.. 229
Simond v. Hibbert ..	.. 150	— v. Chichester	204, 211, 588,
Simonds v. Hodgson ..	.. 93	ii. 622, 628, 894, 904, 905, 1020	
— v. Lawnds ..	.. ii. 1067	— v. Dearlove ..	.. 187
Simons v. Count de Witz ..	.. 125	— v. Earl of Effingham	.. 424
— v. M'Adam ..	.. ii. 714	—, petitioner, Egan, respondent	397
Simpson v. Ingham ..	.. ii. 798, 799	— v. Eggington ..	.. 452
— v. Lamb ..	.. 245	— v. Etches ..	.. ii. 756
— v. Morley ..	.. 127	— v. Evans ..	.. ii. 875
— v. O'Sullivan ..	.. ii. 997	— v. Everett ..	.. 8
Sims v. Helling ..	.. 305	— v. Fox ..	.. ii. 1060
— v. Thomas ..	.. 227, ii. 987	— v. Frederick ..	.. ii. 810
Sinclair v. Jackson	352; ii. 989, 993	— v. Garland ..	.. 235
Singleton v. Cox ..	.. ii. 886, 1027	— v. Goss ..	.. ii. 855, 861
Sir Henry Webb ..	.. 290	— v. Gould	86, 89, 90, 91, 92, 95
Skeffington v. Budd ..	.. ii. 779	— v. Green ..	.. ii. 766, 1006
— v. Whitehurst	.. ii. 779	— v. Hallen ..	.. 183
Skey v. Bennett ..	.. 322, ii. 1047	— v. Hudson ..	.. ii. 860
Skinner, Re ..	.. ii. 1088	— v. Hurst ..	384, 392, 471, 511
— v. Stacey ..	.. 341	— v. Lyster ..	.. 390, 495
Skip v. Harewood ..	142, 143, 381	— v. Osborne ..	.. ii. 596
Skipp v. Wyatt ..	.. ii. 905, 1006	— v. Parkes ..	.. ii. 648
Skipwith ..	.. 464	— v. Pemberton ..	.. ii. 981
Skirrott v. Athy ..	.. ii. 934, 942, 1007	— v. Phillips ..	.. ii. 807
Skitter, Re ..	.. ii. 1092	— v. Pilkington ..	.. ii. 783, 966
Slack, Exp. ..	.. 536	— v. Plummer ..	.. 168, 214
		— v. Pocklington ..	.. 456
		— v. Robinson ..	.. ii. 1080

	PAGE
Smith v. Sieveking	189
— v. Smith	401, 543, 545, 560; ii. 624, 640, 698, 1005
— v. Smoult	345
— v. Timms	232
— v. Vallance	ii. 716
— v. Youde	117
Smith's Case	ii. 784
Smith's Mortgage, Mary, Re ..	ii. 1063
Smithson v. Thompson	ii. 608
Smythe v. Griffin	248
Snagg v. Frizell	ii. 1007, 1008
Snath v. Burridge	299
Snare v. Baker	ii. 798
Snead v. Watkins	187
Snee v. Prescott	ii. 849
Snell v. Finch	441
Snelling v. Squib	583
Snook v. Davidson	217
— v. Watts	369
Snow v. Booth	363, ii. 988
Snowball, Ex parte	299, 549
Soar v. Dalby	ii. 937
Soares v. Rahn	85, 88, 99, 100
Sober v. Kemp	ii. 633, 721, 1040, 1064, 1123
Sodergreen v. Flight	189
Solarte v. Maes Hilbers	ii. 838
Soley v. Salisbury	ii. 769
Solicitors' and General Life Assur- ance Society v. Lamb	ii. 702
Solley v. Wood	284
Sollory v. Leaver	327, 382
Solly v. Forbes	ii. 815
— v. Rathbone	215
Solomon, Exp.	535
— v. Solomon	ii. 696, 916
Somerset v. Cox	254, 641
Somes v. British Empire Shipping Company	460
Sorensen v. The Queen	ii. 881
Sorrell v. Carpenter	583, 587
South, Exp.	82, 83
—, Re	514
— v. Bloxam	ii. 616, 708
South Essex Gaslight Company, Re	262
South Sea Company v. Duncomb ..	374
— Yorkshire, &c. Company v. Great Northern Railway Company	263
Southall, Exp.	198
Southam, Exp.	52
Southampton Boat Company v. Muntz	328
Southampton Boat Company v. Pinnoch	328
Southampton Boat Company v. Rawlins	328
Southcote's Case	458
Sowden v. Sowden	79
Spackman v. Miller	239
— v. Timbrell	ii. 669
Spaight v. Cowne	ii. 796

	PAGE
Spalding v. Ruding	ii. 849, 856
— v. Thompson	ii. 617, 639
Sparke v. Montrion	309, 318
Sparkes v. Smith	23
Sparrow, Exp.	232
— v. Cooper	ii. 628
— v. Farmer	ii. 784
— v. Hardcastle	11
Spear v. Travers	ii. 851, 855
Spears v. Hartley	163, 184, 216
Spencer, Exp.	40
— v. Boyes	ii. 1084, 1090
— v. Chase	243
— v. Cox	256
— v. Pearson	ii. 605, 611
Spensley's Estate, Re	ii. 826, 1009
Spiro v. Hyatt	ii. 684
Spirett v. Willows	228
Spong v. Tucker	115
Spooner v. Sandilands	34, 261
Sporlo v. Whayman	322, 509
Spragg v. Binks	ii. 771
Spring v. Allen	510, ii. 1048
Spronle v. Prior	ii. 710
Spurgeon v. Collier	ii. 730, 883
— v. Witham	ii. 952, 1027, 1034
Squire v. Campbell	ii. 1076
— v. Ford	ii. 807, 809, 815
Stabback v. Leatt	ii. 722
Stables, Re	278
Stackhouse v. Jersey	38, 588; ii. 625, 885
Stackpole v. Earle	249, 254
Stadden v. Sergeant	51
Stafford v. Selby	ii. 727, 728
Staffurth v. Pott	ii. 1029, 1109
Stainbank v. Fenning	92, 168
— v. Shepard	92
Staines v. Rudlin	ii. 1030
Stains v. Banks	ii. 954, 997
St. Albyn v. Harding	ii. 1001
Stamford Banking Company v. Ball	506, ii. 1042
Standard	87
Stanger v. Wilkins	232
Stanhope v. Earl Verney	ii. 602, 603, 829
— v. Manners	348, ii. 994
Stanley, Exp.	267
— v. Bond	ii. 1000
Stansfield v. Cubitt	50, 58
— v. Hallam	ii. 747
— v. Hobson	ii. 739, 740, 741, 912
Stanton v. Hall	272
— v. Sadler	ii. 604
Stapleton v. Conway	ii. 997
— v. Haymen	61
Stead, Re	ii. 990
— v. Banks	ii. 1050
Stedman v. Hockley	197, 198
Stedman v. Hart	122
— v. Poole	563
Steel v. Brown	288
— v. Devonport	ii. 1081

	PAGE		PAGE
Steele v. Maunder ..	.. ii. 887	Straker v. Ewing ..	.. ii. 849
Stein v. Stein ..	.. .. 572	— v. Hartland ..	.. 173
Stephens, Exp. ..	.. ii. 1028	Strand Music Hall Company, Re..	2, 262
— v. Venables ..	.. ii. 642	Strange v. Fooks ..	.. ii. 833
— v. Weston ..	159, 167	Stratford v. Twynam ..	.. 491
— v. Wilkinson ..	.. ii. 847	Stratton v. Davidson ..	.. 391
— v. Willings ..	.. ii. 958	Street v. Anderton ..	.. 389
Stephenson, Exp. ..	.. ii. 708, 709	Stretton v. Ashmall ..	.. 289
— v. Green ..	.. ii. 1044	Stribblehill v. Brett ..	.. 248
Sterling, Exp. ..	.. 201, 202	Stringer v. Harper ..	.. ii. 700
Sterndale v. Hankinson ..	.. 352, 353	Strode v. Parker ..	ii. 993, 994, 996
Sterne v. Beck ..	.. .. 16	Stronge v. Hawkes ..	ii. 700, 707, 878
Stevens, Exp. ..	50, 141, 540	Stroughill v. Anstey ..	282, 283, 285
— v. Austen ..	.. 493	Stuart, Re ..	.. ii. 1204
— v. Mid Hants Railway Company ..	.. ii. 809	— v. Cockerell ..	.. ii. 644
— v. Phelps ..	478, 481, 531	— v. Ferguson ..	145, ii. 800
— v. Stevens ..	.. ii. 876	— v. Kirkwall ..	.. 273
— v. Williams ..	.. ii. 1061	— v. Stuart ..	.. 288
Stevenson v. Blakelock ..	102, 201, 838	— v. Worrall ..	.. ii. 1105
Steward, Exp. ..	.. 8, 81	Stuart's (Sir Simon) Case ..	.. 38
— v. Dunn ..	.. 560	Stubbs v. Lister ..	.. ii. 934
— v. Lombe ..	.. 238	Stubey v. Hayward ..	.. ii. 844
Stewart, Exp. ..	41, 559	Stulz, Exp. ..	.. 260
—, Re Shelley ..	.. 32	Sturch v. Young ..	.. 382
— v. Marquis Donegal ..	ii. 1020	Sturgis v. Bishop of London ..	ii. 674
— v. Moody ..	.. 232	— v. Champneys ..	.. 271
— v. Noble ..	.. ii. 964	Styan, Re ..	.. 544
St. Germans (Earl) v. Crystal Palace Railway Company ..	.. 516	Suche, Joseph & Co., Re ..	.. 532
Stickney v. Sowell ..	.. 289	Suckling v. Coney ..	.. ii. 793
Stileman v. Ashdown ..	.. 228	Suffolk (Earl of) v. Cox ..	.. ii. 641
Stillwell v. Wilkins ..	.. 386	Sultan, Cargo ex ..	9, 100, 101
St. John (Lord) v. Boughton ..	361, 739	Sumpter v. Cooper ..	.. 43
— v. Grabham ..	.. 345	Sunbolf v. Alford ..	.. 188
— v. Holford ..	.. ii. 620	Sutton v. Jones ..	.. 405
— v. Turner ..	.. 362	— v. Rawlins ..	.. 337
— v. Wareham ..	15, 16	— v. Rees ..	.. 158
St. Leger v. Robson ..	.. ii. 1018	— v. Smith ..	.. 518
Stockdale v. South Sea Company ..	564	— v. Stone ..	504; ii. 883, 1063
Stocken v. Dawson ..	143, 146	Swabey v. Swabey ..	.. ii. 817
Stocks v. Dobson ..	.. 539	Swaby v. Dickou ..	407, 410, 426
Stokes v. Clendon ..	.. ii. 885	Swain v. Senate ..	.. 165
— v. Russell ..	.. 456	— v. Smith ..	.. 436
Stokoe v. Cowan ..	.. 474	Swainson v. Swainson ..	.. ii. 689, 690
— v. Robson ..	ii. 1022, 1100, 1101	Swainston v. Clay ..	.. 239
Stonard v. Dunkin ..	.. ii. 868	Swan v. Swan ..	.. ii. 951
Stone v. Evans ..	.. 23	— v. Thornton ..	.. 26
— v. Godfrey ..	.. ii. 761	Swanwick v. Sothorn ..	.. ii. 860, 863
— v. Lidderdale ..	.. 255	Swayne v. Swayne ..	.. ii. 643
— v. Parker ..	.. ii. 698	Sweet v. Pym ..	.. 198, ii. 843
— v. Van Heythuyzen ..	.. ii. 1047	— v. Southcote ..	.. ii. 605
— v. Wishart ..	.. 405	Sweetland v. Smith ..	.. ii. 1019
Stonehewer v. Thompson ..	.. ii. 767	Swinfen v. Swinfen ..	ii. 805, 816, 818
Stonehouse v. Read ..	.. 218	Swire v. Leach ..	.. 69
Storey v. Walsh ..	.. 282	Sydney Cove ..	.. ii. 649, 661
Storie's Trusts, Re ..	.. ii. 1073	Sykes, Exp. ..	.. 529
Story v. Lord Windsor ..	.. 590	— v. Hastings ..	.. 405, 406
Stoveld v. Eade ..	.. ii. 800	Symons v. Blake ..	.. 166
— v. Hughes ..	.. ii. 864	— v. James ..	.. ii. 701
St. Paul v. Dudley ..	.. ii. 810, 817	Sympson v. Frothero ..	.. 159, 164
Stracey v. Devey ..	.. 217		
Strachan v. Thomas ..	.. ii. 987		
Straight v. Patterson ..	.. ii. 1081		

	PAGE
T.	
Taaffe, Re	348
Tabor v. Grover	345
Tabram v. Freeman	252
Tagart, Exp.	30
Tahiti Cotton Company	33
Tait v. Jenkins	389
Talbot v. Braddyl	ii. 730, 735
— v. Kemshead	ii. 1029
Tamvaco v. Simpson	191
Tancred v. Potter	486
Tanfield v. Irvine	391, 402
Tankerville (Earl) v. Fawcett	ii. 691
Tanner v. Heard	ii. 1004
— v. Scovell	ii. 863
Tansley v. Turner	ii. 845
Tapfield v. Hillman	27
Tapp v. Jones	481, 482
Tapply v. Sheather	15
Tarback v. Marbury	228, 235
Tardiff v. Scrughan	140, ii. 834
Tardrew v. Howell	162, ii. 800
Tartar	92, 98
Tasburgh v. Echlin	107
Tasker v. Small	ii. 717, 900, 1061
Tassel v. Smith	ii. 631, 639
Taster v. Marriott	306
Tate v. Austin	ii. 682, 683, 684
— v. Meek	190
Tatham, Exp.	ii. 1082
—, appellant, Andree, respon-	
— dent	168
— v. Parker	414, ii. 929
Tay, Exp.	55
Taylor, Re	ii. 689, 1035
—, Exp.	542
— v. Baker	563, 567, ii. 1004
— v. Coates	340
— v. Debar	ii. 595
— v. Emerson	13, 383
— v. Fields	142
— v. Hawkins	287, 578
— v. Haylin	ii. 923
— v. Kymer	217, 291
— v. Manners	ii. 802
— v. Nicholls	114, 115
— v. Oldham	405
— v. Plumer	157, ii. 882
— v. Popham	166
— v. Robinson	179
— v. Stibbert	561, 573
— v. Taylor	285; ii. 975, 976, 977
— v. Turnbull	116
— v. Waters	ii. 1054, 1078
— v. Wheeler	ii. 594
— v. Zamira	454
Teed v. Carruthers	505
Tempest, Exp.	225, 231
— v. Ord	420
Temple, Exp.	442, ii. 928

	PAGE
Tenison v. Sweeny	397, 590; ii. 600, 822
Tennant v. Trenchard	490, 508, 518, ii. 757
Tennyson, Exp.	589
Teulon v. Curtis	5, 12, ii. 1002
Tew v. Earl Winterton	78; ii. 974, 978
Thackwray v. Bell	ii. 1037, 1115, 1119
Thames Ironwork Bompny v. Patent Derrick Company	460, 486
Tharp, Re	162, 517
Tharpe v. Tharpe	379
Theobald, Re	526
Thomas, Re	ii. 1024
— v. Brigstocke	382, 393, 415, ii. 929
— v. Cross	247, 470
— v. Davies	402
— v. Dawkins	379
— v. Dunning	ii. 913
— v. Evans	ii. 792, 793
— v. Kemeys	ii. 805, 812
— v. Lloyd	246
— v. Terry	ii. 679
— v. Thomas	ii. 618, 682, 686
Thompson v. Baskerville	ii. 885
— v. Bowyer	ii. 740
— v. Cartwright	556, 557
— v. Dominy	ii. 854
— v. Drew	ii. 964
— v. Grant	346; ii. 723, 1105
— v. Hudson	ii. 801, 957
— v. Kendall	ii. 887, 1029, 1031, 1107
— v. Lacy	187
— v. Mosely	311
— v. Royal Exchange As-	
— surance	ii. 882
— v. Rumball	ii. 1015, 1016
— v. Simpson	365, 568, ii. 654
— v. Small	191
— v. Speirs	560
— v. Tomkins	547, ii. 643
— v. Traill	191, ii. 858
— v. Webster	230
Thomson v. Barrett	53
— v. Simpson	81, 82
Thorn v. Rolff	ii. 773
Thornborough v. Baker	345
Thorne v. Neale	113
— v. Nowman	ii. 951
— v. Thorne	ii. 764, 765
Thorneycroft v. Crockett	ii. 635, 884, 949, 957, 1047, 1064, 1107
Thornhill v. Evans	ii. 982, 983
— v. Manning	ii. 1055, 1059, 1064
— v. Thornhill	421
Thornton, Exp.	532
— v. Court	327; ii. 968, 1003, 1061
— v. Finch	107
Thorp v. Browne	135

	PAGE		PAGE
Thorpe, Exp. ..	299, ii. 929, 1011	Trappes v. Harter ..	29
—— v. Gartside ..	ii. 1048	—— v. Meredith ..	259
—— v. Holdsworth ..	ii. 626, 630	Travis v. Milne ..	559, 579
Threfall v. Borwick ..	187	Tredway v. Fotherley ..	22
Thraxton v. Att.-Gen. ..	ii. 763	Tremont ..	522, 523, ii. 1100
Thunder & Weaver v. Belcher ..	450	Trent v. Hunt ..	440, 441, 443, 452
Thurgood v. Cave ..	ii. 1104	Trentell v. Barandon ..	157, 298
Thurlow v. Mackeson ..	489, 496	Trevilian v. Mayor of Exeter ..	156
Thwaites v. McDonough ..	353, 456	Trevor v. Trevor ..	ii. 811
Tibbits v. George ..	81, 83, 552	Trew, Exp. ...	ii. 1011
Tidd v. Lister ..	272, 388, ii. 704, 708	Tribourg v. Pomfret ..	ii. 632, 639
Tiddesley v. Lodge ..	544	Trident ..	91, 96, 97
Tierney, Exp. ..	536	Trilly v. Keefe ..	ii. 1104
Tigress ..	ii. 851, 852, 865, 867	Trimingham v. Mand ..	219
Tilbury v. Brown ..	531	Trimleston (Lord) v. Hamill ..	940, 945, 950
Tildesley v. Lodge ..	ii. 1001	Trimmer v. Bayne ..	ii. 709
Tiley v. Courtier ..	ii. 791	Trott v. Smith ..	ii. 687
Tilson v. Lawder ..	ii. 1087	Troubadour ..	171, 465
Timson v. Ramsbottom ..	545, 547, ii. 643	Troughton v. Binkes ..	ii. 770, 913
Tindal v. Taylor ..	191	—— v. Gitley ..	ii. 879
Tindall's Trusts, Re ..	ii. 775	—— v. Troughton ..	ii. 616
Tink v. Rundle ..	415	Troup's Case ..	263
Tipping v. Hawes ..	ii. 1051	Trulock v. Roby ..	ii. 739, 741, 942, 943
—— v. Power ..	508, 510, ii. 827, 1009, 1029	Trumper v. Trumper ..	305
—— v. Tipping ..	ii. 709	Try v. Try ..	418
Titley v. Davies ..	ii. 632, 633, 634, 704, 706, 892, 1050	Trye v. Earl of Aldborough ..	ii. 915
—— v. Wolstenholme ..	493	Tucker v. Hernaman ..	ii. 879
Tobago ..	ii. 881	—— v. Humphrey ..	ii. 847, 849, 855
Todd v. Moorhouse ..	149	Tuckley v. Thompson ..	509, ii. 1008
Todhunter, Exp. ..	226	Tuder v. Morris ..	ii. 909
Toft v. Stephenson ..	359, 361, 364, 508	Tuffnell, Exp. ..	527
Toivo ..	89, 90	Tull v. Owen ..	14
Toller v. Carteret ..	401, ii. 724	Tullett v. Armstrong ..	274, 275
Tomlin v. Tomlin ..	ii. 934	Tunstall v. Boothby ..	256
Tomlinson v. Gregg ..	ii. 1003	—— v. Trappes ..	489, ii. 655
Tompsett v. Wickens ..	ii. 1078	Tupper v. Haythorne ..	298
Tompson v. Leith ..	ii. 983	Turner, Exp. ..	480, 526
Toms v. Wilson ..	457	—— v. Barnes ..	446
Tomson v. Judge ..	245	—— v. Cameron's Coalbrook Steam Coal Company ..	451
Tonkin v. Lethbridge ..	ii. 776	—— v. Deane ..	203
Tooke v. Bishop of Ely ..	ii. 1059, 1060	—— v. Letts ..	203
—— v. Hartley ..	ii. 1057	—— v. Marriott ..	141
—— v. Hastings ..	79	—— v. Trustees of Liverpool Docks ..	ii. 858, 859
Tooker's Case ..	582	—— v. Richmond ..	ii. 604
Toomes v. Conset ..	ii. 731	—— v. Turner ..	ii. 984
Tooth v. Hallett ..	147	Turner's (Sir Edward) Case ..	269, 271
Topham, Exp. ..	231	Turney, Exp. ..	533
Toplis v. Von der Heyde ..	ii. 759	Turrill v. Crawley ..	187
Tottenham v. Emmett ..	244	Turvill, Exp. ..	ii. 1083
—— v. Green ..	ii. 926, 1001	Turwin v. Gibson ..	163
Toulmin v. Steere ..	545, 552, ii. 806, 807, 808	Tuton v. Sanoner ..	51, 52
Tourle v. Rand ..	ii. 596, 872	Tweddell v. Tweddell ..	ii. 682, 687
Townley v. Crump ..	ii. 844	Tweddale v. Coventry ..	ii. 699
Townsend, Re ..	ii. 1024	—— v. Tweddale ..	552, ii. 632
—— v. Reade ..	159, 165	Twentyman v. Hart ..	465
—— v. Westacott ..	230	Twining, Exp. ..	487, 525, ii. 1011, 1012
—— v. Wilson ..	493	Two Ellens ..	171
Townshend v. Mostyn ..	ii. 688	—— Friends ..	199
Tracy v. Lady Hereford ..	ii. 912	Twopenny v. Boys ..	ii. 822, 824
—— v. Lawrence ..	492, 548	—— v. Young ..	ii. 815

	PAGE
Twort v. Dayrell ..	209
Twynnam v. Hudson ..	149
— v. Porter ..	161
Twyne's Case ..	57, 237
Tylce v. Tylee ..	380
— v. Webb ..	509, 556, 572, ii. 890
Tyler v. Drayton ..	312
— v. Lake ..	ii. 805, 816
— v. Manson ..	ii. 997
— v. Thomas ..	582
— v. Yates ..	241
Tyrrell v. Meed ..	ii. 596
Tyrwhitt v. Tyrwhitt ..	ii. 805, 815
Tyson v. Cox ..	ii. 843, 1062
— v. Fairclough ..	389

U.

Underwood, Re ..	488, 497, ii. 1096
—, Exp. ..	203
— v. Joyce ..	509
— v. Lord Courtown ..	581,
	ii. 654
— v. Wing ..	ii. 774
Union ..	ii. 649, 651
— Bank of Manchester, Exp. ..	539
— Cement and Brick Company, Re ..	182, 203
Unity Bank v. King ..	148
Unsworth, Re ..	ii. 997
Upperton v. Harrison ..	ii. 827, 1008
Uppington v. Bullen ..	ii. 894
Upton v. Vanner ..	ii. 877
Usborne v. Usborne ..	303
Uxbridge (Earl), Exp. ..	212

V.

Vale v. Meredith ..	ii. 1031, 1107
— v. Oppert ..	209
Vallance, Exp. ..	40, 539
Valpy v. Gibson ..	ii. 843
— v. Oakeley ..	ii. 845
Van v. Barnett ..	541
— v. Price ..	417
Van Casteel v. Booker ..	231, ii. 851,
	857, 858, 859
Van Sandau v. — ..	344
Vandeleur v. Blagrave ..	ii. 796
— v. Vandeleur ..	ii. 689
Vanderzee v. Willis ..	ii. 616, 781
Vane v. Lord Barnard ..	557
— (Earl) v. Rigden ..	286
Vann v. Barnett ..	402
Varden Seth Sam v. Luckpathy Royjee Lallah ..	34
Vaughan v. Halliday ..	218
— v. Lloyd ..	341
— v. Rogers ..	ii. 1104
— v. Vanderstegen ..	201, 202,
	274, 275; ii. 822, 881
— v. Vaughan ..	380

	PAGE
Vaughan v. Watt ..	68
Vauxhall Bridge Company, Exp. ..	ii. 1012
— v. Spencer ..	253
Venables v. Foyle ..	ii. 939, 940
Vere, Exp. ..	185
Verity v. Wyld ..	159, 163, 164, 166
Verner v. Winstanley ..	21
Vernon v. Bethell ..	ii. 722, 731
— v. Earl Manvers ..	ii. 1160
— v. Vawdry ..	ii. 923
Vertue v. Jewell ..	77; ii. 853, 856
Vibilia ..	91, 97, 99, 100, 199
Vickers v. Cowell ..	ii. 797, 902, 906
— v. Hertz ..	294, 295
— v. Oliver ..	367
Vickery v. Evans ..	289
Vickress, Re ..	ii. 644
Victoria, &c. Building Society, Re ..	264
Villars, Exp. ..	ii. 676
Vincent v. Going ..	ii. 991
Vint v. Padgett ..	ii. 632, 634
Vulliamy v. Noble ..	146
Vyvyan v. Vyvyan ..	ii. 824

W.

Wace, Exp. ..	529
Waddilove v. Taylor ..	ii. 1016
Wade v. Coope ..	ii. 756
— v. Ward ..	ii. 827, 828, 1011
Wade's Case ..	ii. 789, 793
Wadham v. Marlowe ..	259
— v. Rigg ..	156
Wadmore v. Trevanion ..	416
Wainman v. Bowker ..	ii. 967
Wainwright v. Hardisty ..	2, 275
Wait v. Baker ..	ii. 858
Waite v. Bishop ..	472
Waithman, Exp. ..	559
Wake, Exp. ..	526
— v. Wake ..	ii. 709, 1097
Wakefield ..	95
— v. Brown ..	456
— v. Newbon ..	203, 205
Wakrell v. Delight ..	342
Walcott v. Graves ..	212
Waldron v. Sloper ..	ii. 874
Waldy v. Gray ..	556, 589, ii. 629
Walker v. Armstrong ..	ii. 749
— v. Bell ..	414, 418, ii. 929
— v. Bentley ..	ii. 821
— v. Birch ..	77, 102, 179, 180
— v. Clyde ..	ii. 841
— v. Flamstead ..	579, 584
— v. Giles ..	446
— v. Jones ..	326, ii. 1061
— v. Milne ..	268
— v. Preswick ..	140
— v. Reeve ..	23
— v. Smalwood ..	582
— v. Ware, &c. Railway Company ..	140, 141, 516; ii. 834

	PAGE		PAGE
Walker v. Wild	434	Watson v. Birch	352, 354
— v. Woodward	ii. 934	— v. Brickwood	ii. 692, 694
Wall v. Cockerell	ii. 796	— v. Duke of Wellington ..	81, 82
Wallace v. Breeds	ii. 860	— v. Eales	ii. 1041
— v. Donegal	ii. 655	— v. Lane	454
— v. Fielden	96	— v. Lyon	ii. 841
— v. Woodgate	180, ii. 843	— v. Macquire	ii. 1175
Waller v. Hanger	66, 69	— v. Marston	ii. 1055
— v. Holmes	201	— v. Maskell	167
— or Walter v. Turner ..	ii. 672	— v. Sadleir	78
Wallis v. Bastard	ii. 986	— v. Waltham	438, 506
— v. Woodyear	ii. 710	Watts v. Christie	178
Walmesley v. Booth	243, ii. 993	— v. Cresswell	ii. 878, 881
Walmesley v. Milne	28, 30	— v. Hyde	505
Walsh v. Keane	397	— v. Jefferyes	118, 333
— v. Trevannion	ii. 1087	— v. Lord Eglinton	ii. 891
— v. Whitcombe	34, 261	— v. Porter	ii. 667
Walton, Re	206	— v. Symes	ii. 638, 639, 807, 813, 1037
— v. Butler	147	— v. Thomas	ii. 755
— v. English	51	Waugh v. Land	ii. 756, 757
— v. Johnson	411	— v. Waddell	348
Walwyn v. Coutts	864, ii. 914	— v. Wren	ii. 834
— v. Lee	587, ii. 628	Wave	88, 99
Wand v. Docker	123	Way v. Bassett	146, 361
Warburton v. Edge	203, 211	Wayn v. Lewis	ii. 994, 1078
— v. Hill	547; ii. 642, 643, 668	Wayne v. Hanham	506, 515
— v. Loveland	ii. 656	Wearing v. Ellis	ii. 771, 886
Ward v. Barton	ii. 1016	Weaver v. Maule	ii. 764
— v. Beck	61	Webb v. Austin	453
— v. Booth	ii. 665	— v. Commissioners of Herne Bay	261, 262
— v. Carttar	ii. 794, 936, 939	— v. Fox	200
— v. Hepple	202	— v. Hewitt	ii. 834
— v. Shakshaft	123, ii. 1028	— v. Rorko	241, 242; ii. 722, 945, 967
— v. Swift	406, 418, 426, 431	— v. Russell	456
— v. Yates	ii. 1010	Webber v. Farmer	14
Ware v. Lord Egmont	565	— v. Hunt	ii. 960
— v. Polhill	ii. 812, 816, 820	— v. Jones	ii. 1084
Waring, Exp.	218	Webster, Re	ii. 1014
— v. Coventry	ii. 970	— v. Birchmore	ii. 774
— v. Cox	ii. 866	— v. Cook	243
— v. Ward	ii. 687, 688, 692	— v. Power	306
Warner v. Moore	ii. 899	— v. Taylor	408
Warre, Re Ship	63	— v. Webster	ii. 641, 642
Warren v.	ii. 780	Weeks v. Goode	ii. 842
— v. Warren	414	— v. Stourton	ii. 1099
Warrick v. Warrick	552	Wegener v. Smith	193
Warwick, &c. Railway Company, Re	480	Weld v. Tow	148
Wastell v. Leslie	411, 428	Weldon v. Gould	200
Wataga	170	Welford v. Beezeley	569
Waterfall, Exp.	ii. 822	Welles v. Middleton	245
— v. Penistone	54	Wellesley (Lord) v. Mornington ..	417, ii. 1112
Waters v. Groom	490	— v. Wellesley	79
— v. Mynn	16	Wellesley's (Long) Case	404
— v. Taylor	ii. 924	Wells, Re	ii. 1035
Wutkin v. Morgan	ii. 993	— v. Foster	255
Watkins, Exp.	559	— v. Gibbs	ii. 840
— v. Ashwicke	ii. 793-4	— v. Kilpin	513, ii. 767
— v. Birch	237	— v. Wales	428
— v. Cheek	287, 577, 579	Welman v. Warren	553
— v. Williams	ii. 757	Welsh v. Hole	158, 165
Watkinson v. Bernadiston ..	168, ii. 653		
Watson v. Alcock	ii. 832		

	PAGE		PAGE
Welshman v. Coventry Bank	ii. 625	Whitfield v. Prickett	.. .. 117
Wentworth v. Outhwaite	ii. 847, 861, 864, 865	— v. Roberts	.. ii. 985, 1079
West v. Fritche	.. .. 449	Whiting v. White	.. ii. 738, 740
— v. Jones	.. ii. 1002, 1007	Whitla v. Halliday	.. .. 905
— v. Reid	150, 543, 545, 549, 550, 565	Whitlock v. Waltham	.. .. 795
— v. Skip	.. 142, 143, 237	Whitmore v. Claridge	.. .. 234
Westbrooke v. Blythe	471; ii. 670, 671	— v. Eanpson	.. .. 29
Westbury v. Clapp	.. .. 230	Whitworth v. Gaugain	.. ii. 662, 665
Westoby v. Day	.. .. 484, 485	— v. Rhodes	.. 332, 489
Weston v. Berkeley	.. .. 589	Whyman v. Gath	.. .. 368
— v. Empire Assurance Corporation	.. .. 589	Wickenden v. Rayson	.. 519, 1009
— v. Filer	.. .. ii. 1097	Wickens v. Townshend	412, 414, 423
Westwood v. Bell	.. .. 217	Wickham v. New Brunswick, &c.	
Westzinthus, Re	65; ii. 708, 850, 856	— Railway Co.	266, 267, 329
Wetherell, Exp.	.. .. 35	— v. Nicholson	.. .. 508
— v. Collins	ii. 904, 911, 1019	Wicks v. Scrivens	.. ii. 757, 1065
— v. Garbutt	.. .. 324	Wigg v. Wigg	.. .. 544
Whaley v. Clarke	.. .. 397	Wight's Mortgage Trusts, Re	.. 43, ii. 653
Wharam v. Broughton	.. .. 418	Wiggell v. Wiggell	.. ii. 810, 811
Whatton v. Craddock	.. .. ii. 985	Wilcox v. Wilcox	.. .. 79
Wheatley v. Bastow	.. ii. 830, 833	Wild Ranger	.. .. 174
Wheaton v. Graham	.. .. ii. 1002	— v. Lockhart	.. .. ii. 827, 1008
Wheeler, Re	.. .. ii. 1024	Wildridge v. McKane	.. .. 424
— v. Branscombe	.. .. 451	Wildy v. Mid Hants Railway Company	.. .. 304
— Doe d., v. Gibbons	.. .. 22	Wiles v. Cooper	.. .. 387
— v. Montefiore	.. 445, 456	— v. Gresham	.. .. 79
Wheelhouse v. Ladbroke	.. .. 344	Wiley v. Crawford	.. .. 62
Whishall v. Short	.. .. ii. 1060	Wilkes v. Boddington	.. 587, ii. 602
Whistler v. Webb	.. .. ii. 910	— v. Collin	.. .. ii. 805
Whitaker v. Wright	.. .. ii. 926	Wilkins, Re	.. .. 485
Whitbread, Exp.	.. 39, 40, ii. 824	— v. Carmichael	158, 168, 214
— v. Jordan	34, 550, 572, 580, ii. 871	— v. Casey	.. .. 218
— v. Lyall	.. .. ii. 1102	— v. Lynch	.. .. 410
— v. Smith	ii. 749, 752, 940, 969, 971, 1004	— v. Reeves	.. .. ii. 910
White, Exp.	.. .. 179, 182	— v. Williams	.. 404, 406
— v. Baugh	.. .. 422	Wilkinson, Exp.	.. .. ii. 849
— v. Bishop of Peterborough	.. .. ii. 826, 1010	— v. Beale	.. .. ii. 1043
— v. Chitty	.. .. 259	— v. Candlish	.. .. ii. 796
— v. Dobinson	.. .. 153	— v. Charlesworth	270, ii. 985
— v. James	.. .. 285	— v. Colley	.. 378, 410
— v. Gainer	.. .. ii. 842	— v. Grant	.. .. ii. 1018
— v. Gudgeon	.. .. ii. 1010	— v. Hall	.. .. 444
— v. Hillacre	.. .. ii. 634	— v. Henderson	.. .. 146
— v. Morris	.. .. 238, 456	— v. Simson	.. .. ii. 831
— v. Parnter	.. .. ii. 770	— v. Sterne	.. .. ii. 798, 799
— v. Pearce	.. 165, ii. 1026	— v. Wilkinson	.. .. 96
— v. Simmons	.. .. 322, 530	Wilkinson's Mortgaged Estates, Re	520
— v. Smale	.. .. 386	Willes v. Greenhill	.. 560, ii. 642
— v. Wakefield	141, 574, 576, ii. 879	— v. Levett	.. .. 332
Whitecomb v. Jacob	157, ii. 882	Willett v. Winnell	.. .. ii. 731
Whitegrave v. Craddock	.. .. ii. 1041	William	.. .. 85, ii. 651
Whitehead v. Anderson	ii. 858, 862, 864, 866	— H. Safford	.. .. ii. 651
— v. Vaughan	217, ii. 843	— v. Millington	.. .. 198
Whitehouse v. Frost	.. .. ii. 860	Williams, Exp.	142, 475; ii. 675, 929, 1013
Whitfield v. Faussett	543, 549, 565	—, Re	.. .. 207
— v. Parfitt	.. 14, ii. 1004	— v. Alsop	.. .. 464
		— v. Atkyns	.. ii. 1073, 1075
		— v. Bosanquet	.. .. 23
		— v. Cooke	.. .. 269
		— v. Craddock	ii. 666, 670, 768
		— v. Day	.. .. ii. 920

	PAGE		PAGE
Williams v. Evans	30	Winter, Re.	44
— v. Everett	8, 88	— v. Lord Anson	140, 553, 555, ii. 835
— v. Great Eastern Rail- way Company	516	— v. Easum	270
— v. Johns	417	Winterbottom v. Tayloe	ii. 716
— v. Jones	125	Winthrop v. Murray	237
— v. Lambe	588, ii. 760	Wintle v. Williams	482
— v. Longfellow	ii. 1033	Wisden v. Wisden	ii. 694, 701
— v. Lucas	78	Wise, Re	ii. 1096
— v. Owon	16; ii. 607, 615	—, Exp.	509
— v. Price	ii. 948, 948	— v. Beresford	ii. 670
— v. Sorrell	580, ii. 930	— v. Wise	547, 560, ii. 1001
— v. Springfield	ii. 931	Wiseman v. Carbonell	515
— v. Symonds	118	— v. Vandeput	ii. 849
— v. Thomas	154, 155	— v. Westland	307, 580; ii. 870, 1099
— v. Thorp	539, 547, 548	Witherington v. Banks	329
Williams' Estate, Re	ii. 618, 673, 1087, 1095	Withers v. Lyss	ii. 860
Williamson v. Gordon	ii. 1090, 1105	Withington v. Tate	551, ii. 930
Willie v. Lugg	ii. 630	Witts v. Young	ii. 1079
Willington v. Tate	ii. 796	Wolden v. Gould	200
Willis v. Freeman	218	Wolff v. Summers	188, 189
— v. Palmer	260, 464	Wolstenholm v. Davis	ii. 795
Willoughby v. Willoughby	389; ii. 601, 602, 604, 606, 611, 612	Wolverhampton and Staffordshire Banking Company v. Marston	230
Wills, Exp.	33, 80	Wonham v. Machin	ii. 1008
Wilmot v. Pike	540, ii. 602	Wontner v. Wright	ii. 826, 1023
Wilmshurst v. Bowker	ii. 852, 857	Wood, Exp.	40, 539
Wilson, Exp.	ii. 927	—, Re	224, 234
— v. Anderton	199	— v. Dixie	230
— v. Balfour	35	— v. Downes	245
— v. Bennett	493	— v. Dunn	483
— v. Cluer	ii. 958, 959	— v. Harman	506
— v. Dickson	174, 175	— v. Hitchings	378, 412
— v. Emmett	206	— v. Hodges	ii. 1063
— v. Foreman	154	— v. Jones	ii. 851
— v. Harman	ii. 965	— v. Rowcliffe	293
— v. Heather	102	— v. Surr	ii. 888, 917, 918, 1106
— v. Hood	160	— v. Vincent	119
— v. Lady Dunsany	520, ii. 625	— v. Williams	ii. 904
— v. Metcalfe	ii. 958, 960, 961, 1003, 1005	— v. Wood	422, 476, ii. 753
— v. Round	162	Woodburn v. Grant	2
— v. Tooker	485, 488	Woodcock v. Mayne	ii. 765
— v. Wilson	389, 464, ii. 646	Woodford v. Brooking	ii. 1079
Wilsons	ii. 1081	Woodhouse v. Murray	233
Wilton v. Dunn	454	Woodman v. Higgins	ii. 1101
— v. Jones	ii. 896, 908, 910, 1030	Woods v. Huntingford	ii. 682, 688
Wiltshire v. Rabbits	540	— v. Russell	199, 230
— (or Wilshaw) v. Smith	ii. 788	Woodyatt v. Gresley	156
Winchelsea v. Garraty	118	Wookey v. Pole	68
— v. Norcliffe	19	Woolf v. Summers	188, 189
Winchester (Bishop of) v. Beaver	ii. 891, 1084, 1090	Wooliams, Holdfast & Co. v. Clapham	22
— v. Mid Hants		Woolley v. Drag	ii. 945, 967, 997
— Railway Co.	140, 516	Woolstencroft v. Woolstencroft	ii. 698
— v. Paine	583, ii. 915, 916, 917, 1106	Worcester Corn Exchange Com- pany, Re.	559
Winder, Exp.	232	Wormald v. Maitland	ii. 620, 655
Wing v. Angrave	ii. 774	Worrall v. Harford	159
— v. Tottenham, &c. Railway Company	140, 516	Worsley v. Earl Scarborough	553, 582, 583, 585, ii. 918
Winks v. Hassall	186, ii. 845	Worthington v. Morgan	550, 572; ii. 820, 870
Winn v. Littleton	345	Wortley v. Birkhead	ii. 600, 612, 614
		Wragg v. Denham	ii. 926, 944, 948

	PAGE
Wren v. Kerton	421
Wright, Exp. .. 38, 509,	526, 537
— v. Barlow	ii. 1033
— v. Burroughes	164
— v. Jones	ii. 1002
— v. Kirby	ii. 1010
— v. Lawes .. 180; ii.	863, 864
— v. Mitchell	413
— v. Morley	ii. 756
— v. Mudie	166
— v. Rose .. 497, 541, ii.	1096
— v. Snell	184, 185, 200
— v. Stanfield	43
— v. Vernon	402, 403
Wrightson v. Hudson ..	581, ii. 653
Wrigley v. Sykes	282
Wrixon v. Vize .. 349, 351, 355, 356;	ii. 920, 921, 968, 992
Wroe v. Clayton	ii. 725
Wroughton v. Turtle ..	ii. 1175
Wrouth v. Dawes .. 139, 551, ii.	799
Wulff v. Jay	ii. 833
Wyatt v. Barwell	565, ii. 655
Wylde v. Radford	38, 219
Wyllie v. Pollen	554, 555
Wyly, Exp.	535
Wynch, Exp.	498
Wyndham v. Egremont ..	805, 810, 812
Wynn Hall Coal Company, Re ..	ii. 879
— v. Littleton	ii. 906
Wynne v. Callandar	251
— v. Griffith	390
— v. Lord Newborough ..	379, 404, 406, 407, 410
— v. Robinson	222
— v. Styau 355, 369; ii.	715, 756, 896
Wythe v. Henniker	ii. 701, 710
Wythes v. Lec	141, 142

Y.

	PAGE
Yates v. Aston	5, 373
— v. Hall	90
— v. Hambly .. 5, 12; ii.	735, 894, 904, 959, 962, 1063
— v. Plumbe	ii. 1098
Yea v. Field	307
Yeates, Re	ii. 1015
Yem v. Edwards	305
Yeomans v. Williams ..	ii. 802
Yescombe v. Lander ..	333
Yonge v. Furse	ii. 680
York v. Grindstone	187
— and North Midland Railway Company v. Hudson ..	571
Yorke, Exp.	ii. 1082
— v. Greenaugh	187
Young, Exp.	144, 147, ii. 1082
— v. English .. 202, 205, ii.	933
— v. Lambert	65
— v. Lord Waterpark 363, ii.	988
— v. Moore	251
— v. Neill	172
— v. Radford	ii. 755
— v. Roberts	494
— v. Rocbuck	226
— v. Sutton	182
— v. Ward	ii. 909
— v. Waud	232
— v. Young	ii. 605
Younghusband v. Gisborne	123, 471
Ysabel	86, 96, 97

Z.

Zodiac	89, 94, 95
Zwinger v. Samuda	ii. 851, 855

STATUTES.

	Page
Admiralty Court,	
3 & 4 Vict. c. 65, s. 4	ii. 1070
s. 6	170
Admiralty Court Jurisdiction Act, 1861,	
24 Vict. c. 10, ss. 4, 5	170
s. 6	171, ii. 867
s. 7	171
s. 10	169
s. 11	64, 523, ii. 1070
ss. 14, 15	120
Annuities,	
53 Geo. 3, c. 141	47
17 & 18 Vict. c. 90.. .. .	48
18 & 19 Vict. c. 15, ss. 12, 14	48
Apportionment,	
4 & 5 Will. 4, c. 22,	
s. 2	ii. 965
Assets, Administration of, see <i>Locke King's Acts; Payment of Debts out of Real Estate; Specialty and Simple Contract Debts.</i>	
Attornies and Solicitors,	
6 & 7 Vict. c. 73, s. 37	213, 247
ss. 38, 40	ii. 1034
s. 43	122
23 & 24 Vict. c. 127,	159
s. 27	ii. 980
s. 28	160
33 & 34 Vict. c. 28, s. 19 (1870)	123
Attornment,	
4 Anne, c. 16,	
ss. 9, 10	440
11 Geo. 2, c. 19,	
s. 12	440
Bankruptcy,	
5 Geo. 2, c. 30	198
6 Geo. 4, c. 16.. .. .	316
12 & 13 Vict. c. 106.. .. .	537
s. 87	587
s. 133	50, 226
ss. 135, 136	111
s. 184	530, ii. 675
24 & 25 Vict. c. 134	483, ii. 974
s. 73	233
s. 197	316
32 & 33 Vict. c. 71 (1869)	252, 483, 587
ss. 4, 6	224
s. 12	322, 530, 531, ii. 616
s. 13	ii. 675
s. 15	539, 544, ii. 644
s. 16	322, 530, 531, 537
s. 17	ii. 887
s. 23	527
s. 25	ii. 597, 598, 887
s. 27	280
s. 31	537
s. 32	ii. 674
s. 40	530, ii. 616
s. 45	ii. 771
s. 72	ii. 674
s. 87	283, ii. 675
s. 88	474

Bankruptcy—continued.						Page
32 & 33 Vict. c. 71, ss. 89, 90	..	..	..	..	..	257
ss. 91, 92 ..	..	..	..	..	..	225
s. 94 ..	..	..	..	..	..	226
s. 95 ..	..	..	..	..	..	50, 226
s. 96 ..	..	..	..	..	..	316
s. 125 ..	..	..	..	..	..	226, 316
Bankruptcy Act (Ireland),						
35 & 36 Vict. c. 58,						
s. 21 ..	..	..	..	..	..	224
s. 49 ..	..	..	..	..	..	ii. 674
ss. 52, 53 ..	..	..	..	..	..	225
s. 54 ..	..	..	..	..	..	ii. 675
s. 55 ..	..	..	..	..	..	226
s. 76 ..	..	..	..	..	..	252
s. 101 ..	..	..	..	..	..	280
Benefices, see Ecclesiastical Benefices.						
Benefit Building Societies,						
10 Geo. 4, c. 56, s. 27	..	..	..	..	..	ii. 785
6 & 7 Will. 4, c. 32 ..	..	..	..	..	..	443, ii. 785
s. 1 ..	..	..	..	..	..	ii. 781
s. 4 ..	..	..	..	..	..	ii. 785
s. 5 ..	..	..	..	..	..	374, ii. 1068
Bills of Lading Amendment,						
18 & 19 Vict. c. 111, ss. 1, 2, 3	..	..	..	..	..	ii. 854, 866
Bills of Sale Act (1854),						
17 & 18 Vict. c. 36,						
s. 1 ..	..	..	..	..	..	48
s. 2 ..	..	..	..	..	..	52
s. 7 ..	..	..	..	..	..	52, 64
c. 55 (Ireland)	..	..	..	..	..	55
29 & 30 Vict. c. 96 (1866),						
s. 4 ..	..	..	..	..	..	56
s. 5 ..	..	..	..	..	..	57
s. 6 ..	..	..	..	..	..	ii. 1171
Chancery, Court of,						
13 & 14 Vict. c. 35, s. 17	..	..	..	..	..	129
Charitable Trusts Act, 1853,						
16 & 17 Vict. c. 137,						
s. 21 ..	..	..	..	..	..	ii. 1133
Amendment Act, 1855,						
18 & 19 Vict. c. 124, s. 30	..	..	..	..	..	ii. 1133
23 & 24 Vict. c. 136, s. 15 ..	..	..	..	..	..	ii. 1133
Clandestine Mortgages,						
4 & 5 W. & M. c. 16 ..	..	..	..	..	..	542
s. 2 ..	..	..	..	..	..	ii. 726
ss. 3, 4 ..	..	..	..	..	..	ii. 727
Commissioners Clauses Act,						
10 Vict. c. 16, ss. 1, 2, 75—88	..	..	..	..	..	ii. 1133—1137
Common Law Procedure Act (1852),						
15 & 16 Vict. c. 76,						
s. 219 ..	..	..	..	..	..	334
s. 220 ..	..	..	..	..	..	335
17 & 18 Vict. c. 125 (1854)	..	..	..	..	..	109, 415, 477
ss. 56, 57 ..	..	..	..	..	..	484
s. 60 ..	..	..	..	..	..	109, 478
s. 61 ..	..	..	..	..	..	109, 479
s. 62 ..	..	..	..	..	..	109, 481
ss. 63, 64, 65 ..	..	..	..	..	..	109, 481, 482
s. 99 ..	..	..	..	..	..	478
18 & 19 Vict. c. 102 (1856, Ireland),						
s. 63 ..	..	..	..	..	..	479
s. 64 ..	..	..	..	..	..	481
ss. 65, 66, 67 ..	..	..	..	..	..	481, 482
23 & 24 Vict. c. 126 (1860),						
s. 28 ..	..	..	..	..	..	478
ss. 29, 30 ..	..	..	..	..	..	479

Companies Clauses Consolidation Act, 1845,	Page
8 & 9 Vict. c. 16	205, 267, ii. 1137
s. 3	265
ss. 38—44	ii. 1138
s. 45	ii. 1139
ss. 46—50	ii. 1140
s. 50	371
ss. 51—53	ii. 1141
s. 54	399
ss. 54, 55	ii. 1142
s. 138	ii. 1141
Companies Clauses, 1863,	
26 & 27 Vict. c. 118,	
ss. 22—24	ii. 1142
ss. 25—35	ii. 1143
32 & 33 Vict. c. 48 (1869),	
s. 1	ii. 1142
s. 2	ii. 1143
Companies, Joint Stock,	
1 & 2 Vict. c. 96 }	560
3 & 4 Vict. c. 111 }	
5 & 6 Vict. c. 85 }	
25 & 26 Vict. c. 89 (1862),	
s. 30	32, 548
s. 43	ii. 1139
s. 115	219
s. 164	ii. 1139
Confirmation of Sales, 1862,	
25 & 26 Vict. c. 108, s. 2	520
Contract, Evidence of,	
9 Geo. 4, c. 14, s. 1	ii. 740
Copyhold Enfranchisement,	
4 & 5 Vict. c. 25	ii. 1145
s. 64	ii. 1143
ss. 68—71	ii. 1144
s. 72	ii. 1145
6 & 7 Vict. c. 23,	
ss. 1, 2, 7, 8.. .. .	ii. 1145
7 & 8 Vict. c. 55,	
s. 1	ii. 1145
ss. 2, 4, 7	ii. 1146
15 & 16 Vict. c. 51,	
s. 7	ii. 1146
ss. 10, 12—14, 37	ii. 1147
ss. 38, 42, 43	ii. 1148
21 & 22 Vict. c. 94,	
s. 21	ii. 1148
ss. 22—30	ii. 1149
ss. 31—35	ii. 1150, 1151
Copyhold Inclosure and Tithe Commission Amalgamation,	
14 & 15 Vict. c. 53 }	ii. 1151
25 & 26 Vict. c. 73 }	
County Courts,	
9 & 10 Vict. c. 95	125
ss. 96, 97	475
s. 122	449
19 & 20 Vict. c. 108,	
ss. 50—56	449
28 & 29 Vict. c. 99	ii. 714
s. 1 (3), 10	ii. 1151
County Courts Amendment, 1867,	
30 & 31 Vict. c. 142,	
s. 11	450
Criminal Law Consolidation (1861),	
24 & 25 Vict. c. 96,	
s. 72	907

	Page
Criminal Law Repeal (1861),	
24 & 25 Vict. c. 95	297
Crown Debts,	
13 Eliz. c. 4	ii. 663
25 Geo. 3, c. 35	ii. 1078
s. 1	521
s. 2.. .. .	522
2 & 3 Vict. c. 11,	
ss. 9—11	ii. 1071
34 & 35 Vict. c. 72 (Ireland),	
ss. 10, 11, 22	137
ss. 2—7, 12	138
ss. 20, 21	ii. 1072
Crown Offices (Sale of),	
5 & 6 Edw. 6, c. 16	254, 256, 400
1 Geo. 2, st. 2, c. 14,	
s. 7	254
46 Geo. 3, c. 69,	
s. 7	255
47 Geo. 3, sess. 2, c. 25,	
s. 4	254, 255
49 Geo. 3, c. 126	254, 256
Crown Suits,	
28 & 29 Vict. c. 104,	
s. 47	521
ss. 48, 49	130, ii. 664
s. 50	522
s. 51	ii. 664
Debenture Stock (1871),	
34 Vict. c. 27	288
Debtors, 1869,	
32 & 33 Vict. c. 62	480
s. 5	ii. 840
ss. 11, 12	227, 252
ss. 24, 25	111, 112
s. 29	485
33 & 34 Vict. c. 28	247
s. 4	246
Debts, Payment of, out of Real Estate,	
11 Geo. 4 & 1 Will. 4, c. 47	276, ii. 689
ss. 11, 12	276
3 & 4 Will. 4, c. 104	283; ii. 618, 619, 669, 700, 763
2 & 3 Vict. c. 60	276
s. 1	ii. 1088
11 & 12 Vict. c. 87,	
s. 1	ii. 1088
Distress, see <i>Frauds by Tenants</i> .	
Divorce,	
20 & 21 Vict. c. 85,	
s. 25	270
s. 52.. .. .	120
21 & 22 Vict. c. 108,	
s. 8	270
Dower,	
3 & 4 Will. 4, c. 105	ii. 759
East India Transfer of Forces,	
21 & 22 Vict. c. 106.. .. .	255
Ecclesiastical Benefices,	
13 Eliz. c. 20	257, 400, 472
17 Geo. 3, c. 53 (Gilbert's)	ii. 1130, 1133
ss. 1, 2, 4, 6—8	ii. 1130
ss. 3, 6, 12—14	ii. 1131
ss. 62, 68, 69	ii. 1132
21 Geo. 3, c. 66, s. 1.. .. .	ii. 1133

Ecclesiastical Benefices— <i>continued</i> .		Page
43 Geo. 3, c. 84 .. .. .	.. .. .	257, 472
55 Geo. 3, c. 147,		
ss. 6, 7 .. .. .	.. .. .	ii. 1131
57 Geo. 3, c. 99 .. .. .	.. .. .	257, 472
7 Geo. 4, c. 66 .. .. .	.. .. .	ii. 1133
1 & 2 Vict. c. 23 .. .. .	.. .. .	ii. 1133
ss. 1, 2 .. .. .	.. .. .	ii. 1130
ss. 4, 5, 15 .. .. .	.. .. .	ii. 1131
c. 106 (Benefices Plurality)	.. .. .	ii. 1131
ss. 62—69 .. .. .	.. .. .	ii. 1132
5 & 6 Vict. c. 26,		
s. 13 .. .. .	.. .. .	ii. 1130, 1131
23 & 29 Vict. c. 69 .. .. .	.. .. .	ii. 1133
s. 1 .. .. .	.. .. .	ii. 1130
Ecclesiastical Dilapidations (1871),		
34 & 35 Vict. c. 43 .. .. .	.. .. .	ii. 1133
ss. 12—18 .. .. .	.. .. .	.. 473
ss. 20, 21 .. .. .	.. .. .	.. 473
ss. 38, 62, 73 .. .. .	.. .. .	ii. 1132
ss. 63, 64 .. .. .	.. .. .	ii. 1133
35 & 36 Vict. c. 96, s. 1 (1872)	.. .. .	ii. 1132
Ejectment,		
8 Geo. 1, c. 2 (Ireland) .. .. .	.. .. .	ii. 655, 1051
4 Geo. 2, c. 28, s. 1 .. .. .	.. .. .	.. 378
s. 2 .. .. .	.. .. .	.. 542
s. 5 .. .. .	.. .. .	.. 382
Equity Improvement,		
15 & 16 Vict. c. 80 .. .. .	.. .. .	.. 428
c. 86 .. .. .	.. .. .	.. 428
s. 42 .. .. .	.. .. .	.. ii. 917
s. 42 (r. 4) .. .. .	.. .. .	.. ii. 1090
(r. 5) .. .. .	.. .. .	.. ii. 907
s. 48 .. .. .	.. .. .	507, 518, 519, ii. 1078
s. 49 .. .. .	.. .. .	.. ii. 777, 895
s. 52 .. .. .	.. .. .	.. ii. 918
s. 54 .. .. .	.. .. .	.. ii. 960
Evidence,		
14 & 15 Vict. c. 99,		
s. 6 .. .. .	.. .. .	.. 317
Factors,		
4 Geo. 3, c. 83,		
ss. 2, 3 .. .. .	.. .. .	.. 290, 291
6 Geo. 4, c. 94 .. .. .	.. .. .	.. 293, 295
ss. 2, 3, 5 .. .. .	.. .. .	.. 291
ss. 4, 6—8 .. .. .	.. .. .	.. 291, 292
5 & 6 Vict. c. 39,		
s. 1 .. .. .	.. .. .	.. 292
s. 2 .. .. .	.. .. .	.. 293
s. 3 .. .. .	.. .. .	.. 294, 295
s. 4 .. .. .	.. .. .	.. 295, 296
ss. 5—7 .. .. .	.. .. .	.. 296
Fines and Recoveries,		
3 & 4 Will. 4, c. 74 .. .. .	.. .. .	.. 269, 277
s. 7 .. .. .	.. .. .	.. ii. 1108
s. 21 .. .. .	.. .. .	.. ii. 745
s. 38 .. .. .	.. .. .	.. ii. 596
ss. 41, 62 .. .. .	.. .. .	.. ii. 597
ss. 63—65 .. .. .	.. .. .	.. ii. 598
s. 77 .. .. .	.. .. .	.. 268
4 & 5 Will. 4, c. 92 (Ireland)	.. .. .	.. 269
Franchise,		
8 Hen. 6, c. 7 .. .. .	} .. .. .	.. 443
2 Will. 4, c. 45, s. 23		
6 & 7 Vict. c. 18, s. 74		

	Page
Frauds, Statute of, 29 Car. 2, c. 3, s. 10	104
Frauds by Tenants, 8 Anne, c. 14, s. 7	446
Fraudulent Concealment of Title, 22 & 23 Vict. c. 35, ss. 24, 25 } 23 & 24 Vict. c. 38, s. 8 }	ii. 729
Fraudulent Conveyances, 27 Eliz. c. 4	269
ss. 2, 4—6	223
Fraudulent Devises, 3 Will. & M. c. 14, s. 5	ii. 669
Fraudulent Securities, 13 Eliz. c. 5	229, 232
ss. 2, 6	222, 223
27 Eliz. c. 4	229, 234
s. 2	223
39 Eliz. c. 18, ss. 19, 31, 32	223
Friendly Societies, 10 Geo. 4, c. 56, s. 27	ii. 785
38 & 39 Vict. c. 60 (1875), s. 15	ii. 677
s. 16	268, 374, ii. 1069
Gaming, 16 Car. 2, c. 7, s. 3	249
9 Anne, c. 14, s. 1	249, 253
s. 3	251
18 Geo. 2, c. 34	251
5 & 6 Will. 4, c. 41	250, 251, 253
8 & 9 Vict. c. 109	250, 251, 252
ss. 15, 18	250
Guardians, 12 Car. 2, c. 24, ss. 8, 9	392
Improvement Acts, 8 & 9 Vict. c. 56, ss. 3—6	ii. 1151
ss. 7—10	ii. 1152
9 & 10 Vict. c. 101, ss. 14, 15, 17, 18, 20, 21, 23, 24	ii. 1152
ss. 34—38, 40, 44	ii. 1152, 1153, 1157
ss. 45, 47	ii. 1154
10 & 11 Vict. cc. 11, 38 } 11 & 12 Vict. c. 119 } 13 & 14 Vict. c. 31 } 14 & 15 Vict. c. 53 }	ii. 1154
19 & 20 Vict. c. 9, ss. 1, 3	ii. 1152
s. 8	ii. 1153
s. 10 } s. 18 }	ii. 1154
27 & 28 Vict. c. 114 (Improvement of Land, 1864), ss. 8, 9, 49, 50	ii. 1154
ss. 26, 50—59	ii. 1155
ss. 50, 57—60	ii. 1156
ss. 60—66	ii. 1157
ss. 66—71	ii. 1158

	Page
Inclosure,	
41 Geo. 3, c. 109,	
s. 30	ii. 1158
6 & 7 Will. 4, c. 115,	
ss. 45—48	ii. 1158
8 & 9 Vict. c. 118,	
s. 133.. .. .	ii. 1159
11 & 12 Vict. c. 99,	
s. 8	ii. 1160
20 & 21 Vict. c. 31,	
ss. 6—11	ii. 1160, 1161
Incumbent's Resignation, 1871,	
34 & 35 Vict. c. 44,	
s. 2	473
Infants Relief, 1874,	
37 & 38 Vict. c. 62	ii. 881
Insolvency,	
7 & 8 Vict. c. 96,	
s. 21	ii. 669
11 & 12 Vict. c. 21, s. 7 (India)	ii. 644
Insurance by Mortgagees,	
23 & 24 Vict. c. 145, ss. 11, 32, 34	ii. 947
Interest,	
3 & 4 Will. 4, c. 42, s. 28	ii. 977
1 & 2 Vict. c. 110, ss. 17, 18	ii. 978—980
3 & 4 Vict. c. 105,	
s. 26	ii. 979
23 & 24 Vict. c. 127,	
s. 27	ii. 980
Interpleader,	
1 & 2 Will. 4, c. 58	324
s. 7	478
Isle of Man (1835),	
Statute of	ii. 744
Judgments,	
13 Edw. 1, stat. 1, c. 18 (Westminster 2nd)	103, 108
3 Geo. 4, c. 39,	
ss. 1—5, 8	111
1 & 2 Vict. c. 110	128, 131, 135, 334, 418, 514; ii. 671, 892
ss. 9, 10	111
s. 11	468; ii. 608, 668
s. 12	474
s. 13	104, 333, 392, 400, 469, 470, 474, 511; ii. 609, 666, 668, 670, 768, 893, 941, 1049
s. 14	115, 259, 333, 392
s. 15	116, 117
s. 16	ii. 840
s. 18	119, 122, 123, 478
s. 19	120, 121, 123, 126, 127, 583
ss. 20, 21	123
s. 22	124, 125
s. 68	ii. 1109
2 & 3 Vict. c. 11	131, ii. 918
s. 1	127, 129
s. 2	127, ii. 670
s. 3	126
s. 4	127, 128, 130, 583
s. 5	472, 474, 583
s. 7	129, 583
s. 8	129, 180
3 & 4 Vict. c. 82,	
s. 1	115, 333
s. 2	126, 128, 583

Judgments—continued.

	Page
3 & 4 Vict. c. 105 (Ireland)	115, 136
ss. 12—18	111
s. 19	468
s. 22	127, 469, ii. 893
s. 25	ii. 840
s. 27	119
s. 28	126, 135
s. 30	124
s. 32	ii. 987
6 & 7 Vict. c. 66	111
7 & 8 Vict. c. 90 (Ireland)	137, 138
ss. 2—5	126
ss. 6—9	127
s. 10	129
ss. 11, 12	136
11 & 12 Vict. c. 120 (Ireland)	126, 137, 138
s. 12	129, 136, ii. 1072
ss. 10, 11	ii. 1072
13 & 14 Vict. c. 29 (Ireland)	ii. 666
ss. 1, 2	119, 469, 470
ss. 3, 4	127
s. 5	129
s. 6	135
s. 9	ii. 1072
s. 10	135
s. 11	135, 469, 470
18 & 19 Vict. c. 15	131
s. 2	124
s. 3	127, 129, 474
s. 4	121, 127, 128, 583
ss. 5, 6	128
s. 7	124
s. 11	105
21 & 22 Vict. c. 105 (Ireland)	135
22 & 23 Vict. c. 35, s. 22	129
ss. 24, 25	ii. 729
s. 23	ii. 797
23 & 24 Vict. c. 115, s. 2.. .. .	ii. 1072
c. 38	132
s. 1	106
s. 2	132
s. 3	131, ii. 672
s. 4	131
s. 5	106
s. 8	ii. 729
27 & 28 Vict. c. 112	470; ii. 768, 892, 1049
s. 1	107, 334; ii. 662, 671
s. 2	107
s. 3	132, ii. 662
s. 4	512
ss. 5, 6	513
32 & 33 Vict. c. 35, s. 11	ii. 804
Judgments Extension,	
31 & 32 Vict. c. 54	133—185
Judicature (1873) .. 84, 85, 110, 123—125, 132, 139, 166, 176, 339, 365, 378,	
383, 389—391, 441, 477, 504, 507, 521, 522, 598;	
ii. 804, 922, 988	
Amendment Act (1874)	84, 441, ii. 804
(1875) .. 110, 115, 117, 120, 139, 166, 276, 316, 323, 333, 339,	
365, 378, 391, 402, 466—468, 478, 479, 481, 482, 484,	
513, 514, 522, 531, 532, 589; ii. 721, 743, 918, 988,	
1091, 1103, 1151	

	Page
Land Tax Redemption,	
38 Geo. 3, c. 60, s. 78	270
42 Geo. 3, c. 116, ss. 51, 53, 54, 68, 69, 76	ii. 1165
53 Geo. 3, c. 123, s. 2	ii. 762
1 & 2 Vict. c. 58	ii. 1165
Land Transfer, 1875,	
38 & 39 Vict. c. 87	438
ss. 3, 125	43
s. 19	ii. 1068
s. 22	44
ss. 23, 24	45
s. 26	510
s. 27	502
s. 28	ii. 660, 1068
s. 40	45
ss. 42, 43, 45—47, 78—80	46
ss. 49, 83 (1, 2, 3), 98	47
s. 68	502
s. 87	439
s. 127	44
s. 129	ii. 599
Lands Clauses Consolidation,	
8 & 9 Vict. c. 18	ii. 1013
s. 80	303
s. 108	ii. 1161
ss. 109—111	ii. 1162
ss. 112—114	ii. 1163
s. 114	ii. 729
ss. 115—117	ii. 1164
s. 118	ii. 1165
ss. 127—131	514
Liens on Real Estate,	
23 & 24 Vict. c. 127, s. 28	160
Limitations,	
21 Jac. 1, c. 16, ss. 1, 2	357
3 & 4 Will. 4, c. 27	348, 350, 352, 357; ii. 820, 993
s. 7	444
ss. 14, 15	350
s. 16	351; ii. 742, 743
ss. 17, 18	351
s. 24	349, 351, 363, ii. 742
s. 25	362—364; ii. 737, 743, 988, 992
ss. 26, 27	365
s. 28	488; ii. 734, 741—743
s. 40	352, 358—360, 363, 364, 366; ii. 743, 992
s. 42	358, 363; ii. 618, 743, 987—992
c. 42	357, 359, ii. 988
s. 3	366, 367, ii. 618
ss. 4, 5	366
7 Will. 4 & 1 Vict. c. 28	349, 350
19 & 20 Vict. c. 97 (Mercantile Law Amendment), s. 14	366
Liquidation (1868),	
31 & 32 Vict. c. 68, s. 12	523
Lis pendens,	
2 & 3 Vict. c. 11, ss. 9—11	ii. 1071
30 & 31 Vict. c. 47, s. 2	584, ii. 1072
Locke King's Acts,	
17 & 18 Vict. c. 113	ii. 681, 696, 898
30 & 31 Vict. c. 69 (Construction Act), ss. 1, 2	ii. 697

Lunacy Regulation Acts.

16 & 17 Vict. c. 70,

ss. 116—139	..	..	..	..	..	276, 280
s. 117	..	..	..	..	..	278
s. 118	..	..	..	..	..	278, ii. 703
s. 119	..	..	..	..	..	279, ii. 703

25 & 26 Vict. c. 86,

s. 13..	..	..	..	..	..	279
s. 16	..	..	..	..	..	280

34 & 35 Vict. c. 22 (Ireland, 1871),

s. 63..	..	..	..	..	..	276
s. 64	..	..	..	..	..	280
ss. 65, 66	..	..	..	..	..	278
s. 67	..	..	..	..	..	279

Married Women's Property (1870),

33 & 34 Vict. c. 93,

ss. 12, 13	27
------------	----	----	----	----	----	----

Married Women (Reversionary Interests),

20 & 21 Vict. c. 57 ..

..	269
----	----	----	----	----	----	-----

Mercantile Law Amendment,

19 & 20 Vict. c. 60 (Scotland),

s. 18	97
----------	----	----	----	----	----	----

c. 97 (England),

s. 1	..	..	..	..	..	477
s. 5	..	..	..	..	..	ii. 831
s. 8	..	..	..	..	..	97

Merchant Shipping,

53 Geo. 3, c. 159

..	174, 175
----	----	----	----	----	----	----------

7 & 8 Vict. c. 112,

s. 16	169
-------	----	----	----	----	----	-----

8 & 9 Vict. c. 89

..	60
----	----	----	----	----	----	----

17 & 18 Vict. c. 104 (1854)

..	58
----	----	----	----	----	----	----

s. 2	199
------	----	----	----	----	----	-----

s. 43	62, 548
-------	----	----	----	----	----	---------

s. 50	62, 183
-------	----	----	----	----	----	---------

s. 57	61
-------	----	----	----	----	----	----

ss. 66, 67	58
------------	----	----	----	----	----	----

s. 68	ii. 1069
-------	----	----	----	----	----	----------

s. 69	ii. 660
-------	----	----	----	----	----	---------

s. 70	462, ii. 661
-------	----	----	----	----	----	--------------

s. 71	503
-------	----	----	----	----	----	-----

s. 72	ii. 660, 662
-------	----	----	----	----	----	--------------

ss. 73—75	58, 59
-----------	----	----	----	----	----	--------

ss. 76—80	59
-----------	----	----	----	----	----	----

s. 80	60;	ii. 660, 661, 1070
-------	----	----	-----	--------------------	----	----

ss. 82, 83	60
------------	----	----	----	----	----	----

s. 99	62
-------	----	----	----	----	----	----

s. 100	63
--------	----	----	----	----	----	----

s. 191	169, 170
--------	----	----	----	----	----	----------

ss. 458, 459	172, ii. 650
--------------	----	----	----	----	----	--------------

s. 504	172
--------	----	----	----	----	----	-----

s. 505	175
--------	----	----	----	----	----	-----

ss. 506, 514	176
--------------	----	----	----	----	----	-----

c. 120 (Repeal, 1854)

..	58, 175
----	----	----	----	----	----	---------

25 & 26 Vict. c. 63 (Amendment, 1862)

..	172, 194, 548, ii. 599
----	----	----	----	----	----	------------------------

Parts VIII., IX	ii. 650
-----------------	----	----	----	----	----	---------

s. 3	61
------	----	----	----	----	----	----

s. 54	172
-------	----	----	----	----	----	-----

s. 68	65, 194
-------	----	----	----	----	----	---------

ss. 69—72	194, 195
-----------	----	----	----	----	----	----------

ss. 73—75	195, 196
-----------	----	----	----	----	----	----------

ss. 76—78	196, 216
-----------	----	----	----	----	----	----------

Mortmain,

9 Geo. 2, c. 36 ..

..	289
----	----	----	----	----	----	-----

	Page
Municipal Corporations,	
5 & 6 Will. 4, c. 76	222
s. 94	ii. 1165
23 Vict. c. 16 (Mortgages),	
s. 1	ii. 1165
ss. 2, 6, 10	ii. 1166
Pawnbrokers, 1872,	
35 & 36 Vict. c. 93	70—76, 459, 503; ii. 733, 754
Policies of Assurance, 1867,	
30 & 31 Vict. c. 144,	
s. 3	ii. 640
Probate, Court of,	
20 & 21 Vict. c. 77,	
s. 25	120
Public Records (Ireland, 1867),	
30 & 31 Vict. c. 70,	
s. 13	137
Public Works and Fisheries,	
57 Geo. 3, c. 34	ii. 1167
Public Works Loans, 1875,	
38 & 39 Vict. c. 89	ii. 1167
Railway Clauses Consolidation, 1845,	
8 & 9 Vict. c. 20, s. 2	266
Railway Companies, 1867,	
30 & 31 Vict. c. 127	329, 330
s. 1	329
s. 4	329, 330
ss. 7—11, 14—18	330
38 & 39 Vict. c. 31, 1875	329
Railway Companies (Illegal Securities),	
7 & 8 Vict. c. 85, s. 19	ii. 1139
Railway Companies Securities, 1866,	
29 & 30 Vict. c. 108,	
ss. 1—3	ii. 1167
ss. 4—17	ii. 1168
ss. 18, 19	ii. 1169
1st Sched. Part I.	ii. 1169
1st Sched. Part II.	ii. 1170
Real Estate, Proof of Title to,	
25 & 26 Vict. c. 53	43
s. 14	502
s. 63	36
s. 68	43, 502
s. 73	36, ii. 1176
s. 92	ii. 660
Schedule	502
Real Property Limitation, 1874,	
37 & 38 Vict. c. 57	365
ss. 1, 2, 8, 9	349
ss. 1, 3, 5	351
s. 7	488, ii. 734
s. 8	ii. 820
s. 10	365; ii. 738, 988
Receiver,	
23 & 24 Vict. c. 145,	
s. 11	375
ss. 17—20	376
ss. 21—23	377
ss. 24, 32	375
s. 29	ii. 912

	Page
Redemption (under Ejectment Acts, Ireland),	
4 Geo. 1, c. 5 }	ii. 1051
8 Geo. 1, c. 2, s. 4 }	
Registration, see <i>Bills of Sale Acts</i> .	
2 & 3 Anne, c. 4 (West Riding) }	41, ii. 658
5 Anne, c. 18 (West Riding) }	
s. 10	ii. 1067
ss. 4, 11	126
6 Anne, c. 2 (Ireland)	42; ii. 653, 658
c. 35 (East Riding and Hull) ..	41, ii. 653
ss. 1, 14, 15	ii. 658
s. 19	126, ii. 670
s. 27	ii. 1067
s. 28	126
7 Anne, c. 20 (Middlesex)	41; ii. 653, 658
ss. 1, 6	ii. 659
s. 16	ii. 1067
s. 18	126, ii. 670
8 Anne, c. 10, s. 3	ii. 1067
8 Geo. 2, c. 6 (North Riding) ..	41, ii. 658
ss. 18, 19, 33	126, ii. 670
s. 32	ii. 1067
2 & 3 Will. 4, c. 87 (Ireland) }	
27 & 28 Vict. c. 76 (Ireland) }	41, ii. 653
Reversions, Sales of,	
31 Vict. c. 4	240
Satisfied Terms,	
8 & 9 Vict. c. 112	364; ii. 601, 604
Sequestration, 1871,	
34 & 35 Vict. c. 45,	
s. 1	473
s. 3	ii. 670, 677
Service out of Jurisdiction,	
2 Will. 4, c. 33	401
4 & 5 Will. 4, c. 82	391, 401
Sewers, Statute of,	
23 Hen. 8, c. 5, s. 3	443
Sheriffs (Ireland),	
5 & 6 Will. 4, c. 55,	
ss. 31—33	392
ss. 34, 35, 38	393, 394
s. 37	392
3 & 4 Vict. c. 105,	
ss. 21, 23, 24, 27	395
19 & 20 Vict. c. 77,	
ss. 2—4	396
s. 6	507
Specialty and Simple Contract Debts,	
32 & 33 Vict. c. 46	ii. 618, 673
Stamps,	
48 Geo. 3, c. 149	ii. 1176
55 Geo. 3, c. 184	ii. 1175
24 & 25 Vict. c. 91, s. 34	ii. 1171
33 & 34 Vict. c. 97 (1870),	
s. 57 }	ii. 1171
Sched. }	ii. 1172—1174
s. 93	ii. 1173
s. 105	ii. 1175
ss. 106—108	ii. 1176
ss. 109—112	ii. 1177
s. 115	ii. 1178

Stamps—continued.	Page
84 & 85 Vict. c. 4 (1871),	
s. 2	ii. 1177
s. 3	ii. 1178
s. 5	ii. 1174
Statute Law Consolidation,	
24 & 25 Vict. c. 96,	
ss. 75, 76	486
Statutes Merchant,	
11 Edw. 1 (Acton Burnell) }	
13 Edw. 1, st. 3, c. 1 }	
27 Edw. 3, st. 2 }	.. 108
23 Hen. 8, c. 6 }	
27 Eliz. c. 4, ss. 7, 8 }	
29 Car. 3, c. 3, s. 18 }	.. 109
8 Geo. 1, c. 25 }	
Staying Proceedings,	
4 Anne, c. 16,	
ss. 12, 13	341, 344
7 Geo. 2, c. 20	313, ii. 631
s. 1 .. .. .	.. 334
ss. 2, 3 .. .. .	.. 335
15 & 16 Vict. c. 76 (Common Law Procedure, 1852),	
s. 219 .. .. .	.. 334
s. 220 .. .. .	.. 335
Tenancy,	
8 Anne, c. 14,	
s. 1 .. .. .	.. 477
s. 7 .. .. .	.. 445
Tender,	
3 & 4 Will. 4, c. 98, s. 6 }	
8 & 9 Vict. c. 37, s. 6 }	.. 791
c. 38, s. 15 }	
Tithes,	
6 & 7 Will. 4, c. 71	ii. 821, 1153
1 & 2 Vict. c. 64	ii. 821
c. 109, s. 30 (Ireland)..	.. 388
2 & 3 Vict. c. 62, s. 1 }	
9 & 10 Vict. c. 73, s. 19 }	.. 821
Transfer of Land, see <i>Real Estate, Proof of Title to</i> .	
Trustees and Executors,	
11 Geo. 4 & 1 Will. 4, c. 47	ii. 1088
s. 10	ii. 1084
s. 11	ii. 1094
s. 12	ii. 1087
1 Will. 4, c. 60,	
s. 2, (rep.)	ii. 1094
4 & 5 Will. 4, c. 29	288
2 & 3 Vict. c. 60, s. 1	ii. 1088
13 & 14 Vict. c. 60	ii. 1087, 1094, 1097
ss. 3—5	ii. 1091
ss. 7, 8	ii. 1085, 1091
s. 10	ii. 1092
s. 16	ii. 1097
s. 19	ii. 1092
ss. 20, 21	ii. 1093
ss. 26, 27	ii. 1091
s. 28	ii. 1094
s. 29	ii. 1089
s. 30	ii. 1085, 1097, 1104
s. 37	ii. 1097
ss. 46, 47	ii. 764
ss. 54—57.. .. .	ii. 1093

Trustees and Executors—*continued*.

Page

15 & 16 Vict. c. 55,							ii. 1089, 1097
s. 1							ii. 1094
s. 2							ii. 1097
s. 37							
22 & 23 Vict. c. 35,							ii. 804
s. 11 .. .. .							.. 281
ss. 14—18							ii. 797
s. 23 .. .. .							.. 288
s. 32							
23 & 24 Vict. c. 38,							288
s. 12							502
c. 145							284
s. 9							498, 499
ss. 11, 12							498, 499, 500
ss. 13—15							498, 500
s. 16							ii. 797
s. 23							500
s. 24							506
s. 29							498
s. 32							500
s. 34							
Trust Funds, Public and Charitable, Investment of,							
33 & 34 Vict. c. 34,							288
s. 1							521
s. 2							
Vendors and Purchasers, 1874,							
37 & 38 Vict. c. 78,							10, ii. 1066
s. 4							ii. 599
s. 7							569
s. 8							
Wages Attachment Abolition, 1870,							480
33 & 34 Vict. c. 30							
West India (Estates Relief),							
2 & 3 Will. 4, c. 125, ss. 21, 22							ii. 677

ORDERS OF COURT.

Accounts, Cons. Ord. XX.						ii. 899
Appeal, Cons. Ord. XXI. r. 2						586
Assignment <i>pendente lite</i> , Judic. Act, 1875, Ord. L. rr. 1, 2						ii. 918
Attachment (see <i>Debts</i>).						
Bankruptcy,						
Rules (1870) 50, 78						524
79—81						525
99—101						537
110						182
117						ii. 771
77, 137						ii. 974
272						537
(1871) 8						182
Chancery,						
<i>Cestuis que trust</i> ,						
Ord. 30, Aug. 1841						ii. 907
Decree,						
Cons. Ord. XXIII. r. 11						ii. 895, 898, 903
12						ii. 1103, 1104
21						ii. 1051
<i>Pro confesso</i> ,						
Cons. Ord. XXII. r. 8					515; ii. 1103, 1104	
15 (3)						ii. 1104

Charging Order, Judic. Act, 1875, Ord. XLVI. ..	Page 115, 117, 333
County Courts, Consolidated County Court Orders, Nov. 1875 ..	ii. 1151
Debts, Attachment of, Judic. Act, 1875, Ord. XLV. r. 1	478
2	479
3	481
5	482
6, 7	479
9, 10	484
Documents, Production, Judic. Act, 1875, Ord. XXXI. r. 11	316
Execution, Judic. Act, 1875, Ord. XLII. rr. 1-5, 7	466
15-18	467
19-21	468
XLII.	513
XLVII.	514
Foreclosure, Ord. 87, May, 1847	ii. 1104
Cons. Ord. XXII. r. 8 }	ii. 1108
XXIII. r. 12 }	ii. 1108
Judic. Act, 1875, Ord. XXIX. r. 10 }	ii. 1103
XXXVI. r. 18 }	ii. 1103
Interest, Cons. Ord. XLII. r. 10	ii. 977
Land Transfer Act, 1875, Rules (1875) 33	44
20	44, 45, ii. 660
21	45
35	46
22, 27	ii. 1068
Lien (Attornies), Ord. 63, Hil. Term, 1853	166
Lis pendens, Judic. Act, 1875, Ord. L.	582
Multifariousness, Judic. Act, 1875, Ord. XVII. rr. 1, 2	ii. 721
Order for Payment, Judic. Act, 1875, Ord. XLII. rr. 1, 20.. .. .	120
Pleading, Judic. Act, 1875, Ord. XIX. r. 18	589, ii. 743
Receiver, Ord. 23, April, 1796	426, 430
63, April, 1828	409, 430
13, Oct. 1852	379
Cons. Ord. XXIV. r. 1	379, 424
2	429
3	428, 429
4	438
XXXV. r. 19	ii. 960
23	429
33, 34, 54	428

ORDERS OF COURT—MISCELLANEOUS AUTHORITIES. lxxvii

Receiver— <i>continued</i> .	Page
Cons. Ord. XLII. r. 13	433
Regulations, Sched. 4	427
Judic. Act, 1875,	
Ord. II.	391
Recognizance,	
Cons. Ord. XLII. r. 5	106
Service,	
Cons. Ord. X. r. 7	402
XXIX. r. 5	408
Judic. Act, 1875,	
Ord. II. r. 4 }	402
XI. }	
Set-off,	
Judic. Act, 1875,	
Ord. XIX. r. 3	166, ii. 804
XXII. r. 10	166
Stop Order,	
Cons. Ord. XXVI.	119
Suitors' Fund, Solicitor to,	
Cons. Ord. XI. r. 4	ii. 1027

MISCELLANEOUS AUTHORITIES.

Abbott on Shipping	168
Archbold's Practice (Prentice)	166
Bacon's Abridgment	181, 567, 575; ii. 593—595, 714, 791, 967
Beames' Chancery Orders	408, 583
Bell's Commentaries on the Law of Scotland	ii. 800
Best on Presumptions.. .. .	ii. 773
Blackburn's Contract of Sale	ii. 855
Blackstone's Commentaries	9
Brooke's Abridgment	67
Burge's Colonial Law	8, 150, ff. 931
Calvert on Parties	ii. 883, 892, 895, 901
Cases and Opinions	315, 320
Chambers on Infancy	ii. 703
Code Civil	4, 7, 98, ii. 775
Code de Commerce	ii. 649
Coke on Littleton ..3, 11, 108, 344, 345, 543, 551, 552, 582; ii. 602, 664, 760, 763, 788, 794, 915	
Colquhoun, Summary of Roman Civil Law 3, 7, 168; ii. 791, 794, 798, 799, 800, 829, 931	
Comyn's Digest	7, 480, 485, 488; ii. 714, 781
Coote on Mortgages	251; ii. 603, 605, 608, 614, 765, 884
Coutume de Normandie	7
de Paris	7
Cowell's Interpreter	9
Cross on Liens	487
Cust on the West India Incumbered Estate Acts	150, 151, 153, 517
Daniell, Chancery Practice	334, 368, 418, 420, 429, 433, 435, 436; ii. 780, 1035, 1102
Dart and Barber, Vendors and Purchasers	ii. 1067

	Page
Davidson's Conveyancing Precedents .. 43, 307, 377, 497; ii. 1066, 1067, 1097	
Digest	306, ii. 801
Doctor and Student	ii. 604
Domesday Book	4
Duke on Charitable Uses	541, ii. 623
Fonblanque on Equity	ii. 871
Fowler's Exchequer Practice	ii. 1063
Gilbert's Forum Romanum	ii. 663
<i>Lex Prætoria</i>	ii. 604, 690
Tenures	ii. 1067
Glanvill	2, 4, 7, 320, 458, 486, 714
Great Yarmouth, Documents relating to Borough of	108
Griffith on Bankruptcy	ii. 974
Hallam's History of the Middle Ages	198
Hedaya, The	64, 69, 461
House of Lords' Journals	586
Hubback on Evidence of Succession	ii. 773
Jarman on Wills	493; ii. 700, 1092
and Bythewood's Conveyancing	320
Jones on Bailments	458, 461
Judgments (Lord Bacon's Orders)	106
Kent's Commentaries	459
Lauriere : Textes des Coutumes de la Prévôté et Vicomté de Paris	3
Leigh and Dalzell on Conversion	541
Lewin on Trusts	307
Lindley on Partnership	300, 334
Littleton's Tenures	3, 4, 345; ii. 714, 772, 789, 793, 803
Lye's Anglo-Saxon Dictionary	4
Machlachlan on Shipping	173, 174
Mackelvey, <i>Systema Juris Romani</i>	486
Macpherson on the Law of Mortgage in Bengal and the North West Provinces	653
Maddock's Chancery Practice	506
Manwood's Forest Laws	69
Mitford on Pleading	103, 471; ii. 916, 1029, 1033
Montague's Summary of the Law of Lien	201
Morgan and Davey, Chancery Costs	ii. 1035
Morgan's Statutory Jurisdiction of the Court of Chancery	498
Mourlon's <i>Répétitions écrites sur le Code Civil</i>	ii. 775
Orders in Council (17 Nov. 1863)	484
Pepys' Diary	ii. 1066
Phillips on Evidence	ii. 773
Pitman on Principal and Surety	ii. 830
Plowden	67
Powell, Mortgages 272, 543, 544, 553, 557, 558; ii. 596, 607, 612, 613, 755, 757, 758, 760, 761, 778, 889, 901, 911, 957, 978, 979, 994, 996	
Preston on Abstracts	ii. 755
Pulling's Customs of London	109
Reg. Lib.	ii. 781
Rigge on Registry	42
Rolle's Abridgment	456
Scriven on Copyholds	443, ii. 722

	Page
Seton on Decrees	379, 380, 401, 410, 416, 419, 432, 436, 437, 509; ii. 782, 884, 942, 949, 950, 967, 1016, 1046, 1050, 1064, 1065, 1068, 1087, 1090, 1102
Shelford, Lunacy	ii. 702
Sheppard's Abridgment	67
Touchstone	445, ii. 801
Smith's Leading Cases	227, 448, ii. 848
Mercantile Law	ii. 852
Spence's Equity Jurisprudence	509
Stephen's Blackstone, Ed. 6	101
Story, Agency	ii. 882
Bailments	7, 64—70, 306, 321, 374, 458, 459, 461, 486, 488, 490; ii. 714, 729, 781, 804, 841, 843, 881, 882, 935
Sugden, Powers	ii. 748, 749
R. P. S.	353, 354, 357, 358, 362; ii. 601, 740, 742, 746
V. & P.	42, 140, 141, 235, 244, 307, 471, 543, 544, 552, 557, 567—570, 576, 583, 586, 591; ii. 602, 707, 722, 836, 916, 1066
Taylor, Evidence	ii. 773
Termes de la Ley	9
Tothill	582, 583, ii. 623
Van Leeuwen	ii. 964
Viner's Abridgment	69
Watkins, Copyholds	33
Wentworth, Office of Executor	ii. 672
Weskett	101
West on Extents	67

ERRATA.

- Page 14, line 21, for "security," read "conveyance."
 „ 63, note (k), for "17," read "7."
 „ 122, line 15, for "7 & 8 Vict.," read "6 & 7 Vict."
 „ 256, note (k), for "3 Moo. C. J.," read "3 Mo. E. I."
 „ 329, remove to note (o) part of note (n), from the words "Before these acts" to the end.
 „ 372, note (a), for "Dalby," read "Balby."
 „ 486, note (x), for "2 Eq. Ca. Abr.; 6 Comyn," read "2 Eq. Ca. Abr. 6; Comyn.
 note (y), for "White," read "Waite."
 „ 587, lines 8, 10, 13, for "plea," read "defence."
 „ 601, note (h), line 4, for "110," read "112."
 „ 611, note (e), remove "*Shepherd v. Titley*" to, from note (f).
 note (f), *dele* "*Rose v. Watson*," with its references; *add* "*Brace v. Duchess of Marlborough*, 2 P. W. 491."

ADDENDA.

- Page 27.—End of line 5 *add* "as the latter will prevail."
 „ 117.—In last line but one *add* "And a stop order on funds standing in the Chancery Division of the High Court may now be had by a person who has obtained judgment in another Division, without a preliminary charging order. *Hopewell v. Barnes*, L. R., 1 Ch. Div. 680."
 „ 199.—To note (o) *add* "*Hingston v. Wendt*, L. R., 1 Q. B. Div. 367."
 „ 224.—To line 24 *add* "A settlement with a covenant to pay off a mortgage to which the estate is subject is void against the trustee under this section, if the settlor had not sufficient assets to pay the mortgage as well as his other debts. *Hurttable, Exp.*, L. R., 2 Ch. Div. 54."
 „ 232.—To note (b) *add* "*King, Exp.*, L. R., 2 Ch. Div. 256."
 „ 247.—To note (o) *add* "And see *Wynn Hall Coal Co., Re*, L. R., 10 Eq. 515; *Gen. South American Co., Re*, L. R., 2 Ch. Div. 337; *Native Iron Ore Co, Re*, *id.*, 345."
 „ 686.—To note (m) *add* "*Gray v. Downman*, 27 L. J., N. S., Ch. 702."
 „ 702.—To line 4 *add* "Or if the Company are themselves the principal mortgagees, to insist that the policy was void, and to throw the debt upon the other securities. *White v. British Empire, &c. Assurance Co.*, L. R., 7 Eq. 894."

THE LAW OF MORTGAGE

AND

OTHER SECURITIES UPON PROPERTY.

CHAPTER I. OF SECURITIES BY CONTRACT.

PART 1.—OF THE SEVERAL KINDS OF SECURITIES UPON
PROPERTY AND THEIR INCIDENTS, AND OF
MORTGAGES LEGAL AND EQUITABLE.

PART 2.—OF PAWNS OR PLEDGES.

PART 3.—OF HYPOTHECATIONS.

PART 1.

1. *Of the several Kinds of Securities upon Property, and their Incidents.*
10. *Of legal Mortgages of Real and Chattel Real Estate.*
22. *Of Mortgages of Chattels personal.*
33. *Of Equitable Mortgages.*
45. *Of the Registration of Mortgages and Bills of Sale.*
60. *Of Mortgages of Ships.*

1. A SECURITY upon real or personal property for the payment of a debt, or the performance of an engagement, may be by way of—

MORTGAGE.—PLEDGE.—HYPOTHECATION.—LIEN.

2. To each of these is incident—

A right in the creditor to make the property answerable for the debt or engagement.

A right in the debtor to redeem the property, by paying the debt or performing the engagement.

Upon such payment or performance, a determination of the creditor's interest in the property, and a liability on his part, if it be in his possession, to restore it to the owner.

3. A mere contract to borrow or lend money on mortgage or other security will not be enforced, the damage being a mere money demand, the amount of which can be calculated; and damages were not given in equity for the breach of such a contract (*a*). But an agreement to execute a mortgage in consideration of a debt due, or of an advance actually made, will be enforced unless the money be repaid (*b*).

Effect will also be given to an intention to create a security by a person capable of creating it, notwithstanding any mistake in the manner of making it (*c*); and securities will take effect according to the intention of the parties, both as to the quantity of the property charged and the extent of the mortgagor's interest in it. If, therefore, the mortgagor be possessed of something which can be identified as the intended subject of the security, the latter will be limited to the quantity specified, though that quantity may exist only as part of a larger property specified in the security: on the other hand, the security will affect the interest really possessed by the mortgagor, though he purport to pass an estate which is not really vested in him (*d*).

4. Securities by way of mortgage, pledge, or hypothecation arise by contract.

5. A MORTGAGE may be LEGAL or EQUITABLE.

The LEGAL mortgage may be one of two kinds, viz.:—

1. The mortgage (proper) *mortuum vadium* (*e*) is

(*a*) *Chinnoek v. Sainsbury*, 6 Jur., N. S. 1318; *Rogers v. Challis*, 27 Beav. 175; see *Sichel v. Mosenthall*, 8 Jur., N. S. 275; *Hunter v. Langford*, 2 Mol. 272; *Larios v. Bonany Y. Gurety*, L. R., 5 P. C. 346. This rule seems to have been overlooked in the case of *The Alliance Bank v. Brown*, 2 Dr. & S. 289; 10 Jur., N. S. 1121; where a demurrer to a bill for the performance of an agreement to make a security was argued only on the question of want of consideration, and was overruled on the ground that the forbearance of the creditor to sue in consequence of the agree-

ment was sufficient.

(*b*) *Ashton v. Corrigan*, L. R., 13 Eq. 76; *Hermann v. Hodges*, 16 id. 18.

(*c*) *Strand Music Hall Company, re*, 13 L. T., N. S. 177.

(*d*) *Grievies v. Kirsopp*, 5 Beav. 283; *Woodburn v. Grant*, 22 Beav. 483; *Wainwright v. Hardisty*, 2 Beav. 363.

(*e*) Ancient authorities disagree as to the reason why the word *mortuum* was applied to distinguish a particular form of the *vadium* or pledge. According to Glanvill, a pledge is called *mortgage*, when the fruits or rents, which are received, go in reduction of

an assurance to the creditor of the whole or part of the debtor's *general* property, in real or personal

the demand. (Lib. 10, c. 6.) And again, he says (c. 8), when an immoveable thing is put in pledge, and seisin of it has been delivered to the creditor for a definite term, it has either been agreed between the creditor and debtor, that the rents shall in the meantime reduce the debt, or that they shall not be so applied. The former agreement is just and binding; the other, unjust and dishonest, and is that called a *mortgage*. But Littleton (s. 332), after describing the *mortuum vadium* as a feoffment, upon condition that if the feoffor pay the money to the feoffee at a certain day, the feoffor may re-enter, says, it is called *mortgage*, for that it is doubtful whether the feoffor will pay at the day limited; and if he doth not pay, then the land is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay, then the pledge is dead as to the tenant in mortgage. To which Lord Coke adds the farther reason, that it is to distinguish it from *vivum vadium*; so called, because if one pledge an estate until the pledgee have received the debt out of the profits of the land, neither money nor land dieth or is lost.

With which definition agrees that of an old French writer, who also shows how much the ecclesiastical jealousy of usury had to do with the origin of these different forms of security, and how in each country creditors adopted similar devices for getting the advantage of their debtors.

"When creditors," says Lauriero, "intimidated by ecclesiastical censures, took lands in pledge, with an agreement that the profits should reduce the principal, this pledge was called *rif*, because, as our old practitioners say, it discharged itself by its own produce, which was very just and lawful. But when the creditor took or received the profits in pure gain to himself and in

pure loss to the unhappy debtor, it was called *mort-gage*, or *gage-mort*, because it did not discharge or free itself. And this *mort-gage* was allowed only in a few cases in which it was just to admit it; as where a father, marrying his daughter, and giving her a portion, which he was unable to pay in ready money, gave an estate in pledge to his son-in-law, to receive the rents till the portion should be paid; or a vassal borrowed money of his feudal lord, and gave his fief in pledge; because, as the lord so long as the pledge lasted, lost the services of the vassal it was right he should be indemnified by having the profits of the pledged fief."

"As, except in these two cases, mortgages were odious, the usurers disguised them by buying their debtors' estates, with a right of repurchase, for a certain number of years; but upon examination of these new contracts the theologians and canonists decided that they were fictitious, usurious, and true antichrèses, when the sale was made at an under-value, when there was a right of revocation or an equivalent agreement, and when the buyer was suspected of usury."

"These fictitious contracts were much used in the customs of Anjou, Maine, Touraine and the Loudunois, where they are still known under the name of *pignoratifs*; but the Court has always held them to be illegal and has forbidden their use." (Texte des Coutumes de la Prévôté et Vicomté de Paris.)

The *mortuum vadium* of Glanvill seems to have been like the Welsh mortgage (which also resembled the *pactum antichrèseus* of the Roman law, Colquhoun, R. C. L. § 1497), rather than the common law mortgage spoken of by Littleton; the mortgage in the nature of a Welsh mortgage being analogous to the *vivum vadium*. We may perhaps infer from an Anglo-

estate, conditional upon the non-payment, and redeemable upon payment, of a debt at a fixed time; and upon breach of the condition the assurance becomes absolute, but remains subject to an equitable right of redemption until the expiration of a certain period; unless the right be sooner foreclosed by judicial process at the suit of the creditor, or be destroyed by sale under judicial process or under a power incident to the security (10).

It entitles the mortgagee to immediate possession before default in payment (e) (715).

And it implies a debt, for the recovery of which

Saxon deed of the tenth century, that a security resembling the ancient *mortuum vadium*, and possibly derived from the *pactum antichrèseos*, was used in England at that time. It appears from this document that land was delivered by Sigelm, the father of Eadgifa, queen of Eadward the elder, in pledge for £30 to Goda, who held it for seven years. Sigelm having paid off the debt, and bequeathed the land to Eadgifa, was afterwards slain in battle, and Goda then denied having received the money, and for six years withheld the land. Eadgifa purged her father by oath as to the payment, but could not recover the land without the interference of the reigning king; and after being again despoiled of it, and a second time regaining it, she bestowed it upon the Church. (See Lye's Anglo-Sax. Dict. vol. 2, Appendix, No. 4, Ed. 1772.) Assuming the authenticity of this document, it shows that possession of the land was delivered, and that the right of redemption was admitted after seven years; and it seems to be implied that no reduction of the debt had taken place, by reason of the mortgagee's possession. In *Domesday* the mention of lands in mortgage seems to imply the possession of the mortgagee (see *Domesday for Essex*, fols. 157, 158, 167), and if, as is possible, the alleged mortgages were only pretences to cover

acts of spoliation against the former owners, it is still more clear, that the possession of the mortgagee was then incidental to the security; as it was also in the time of Glanvill, when there could be no conveyance without livery of seisin.

The antichrèse of the Code Napoléon appears to partake of the nature both of the old *mortuum vadium* and of the *vivum vadium*. By it the creditor acquires a right over the enjoyment only of the estate, which, however, he may retain until payment of his whole debt. He must apply the profits annually in discharge of the interest first, and then of the principal of the debt, and is bound to account. In the absence of special agreement he pays the outgoings of the property, which it is also his duty to keep in repair, deducting these expenses from the produce. It seems that the extent to which the debt is to be discharged by the produce and the manner of paying it, may be the subject of particular agreement, but no agreement is permitted which will give the mortgagee an absolute interest in, or a right to sell the estate, on default of payment at the appointed day, or otherwise than by the regular legal process. (Code Civil, §§ 2085—2091.)

(e) *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.

an action will lie against the debtor (*f*); but which is only of the nature of simple contract, unless it be converted into a specialty by bond or covenant (*g*) (1112).

2. The Welsh mortgage (*h*) is an assurance of property to the creditor, without condition for payment; and possession and receipt of the rents and profits by the mortgagee, either in lieu of interest or for payment of interest and principal, are its necessary incidents (*i*) (11).

Being unconditional it admits of no foreclosure, but is redeemable at law as well as in equity, until, after full payment of the debt out of the profits of the estate, the right is barred by the statutory limitation.

It implies a debt for the purpose of adjusting the equities between the real and personal estate of the debtor, but not so as to give any right of action against him (*j*).

The **EQUITABLE mortgage** is a mortgage which, for want of a transfer of the legal estate, has only an equitable operation (33). The creditor, however, may demand the same right of foreclosure which is conferred by that form of security, subject to the rights of prior creditors, and in some cases, also, may call for a sale (834).

6. A mortgage may be transferred either absolutely or by way of sub-mortgage, and with or without the concurrence of the mortgagor (52); but in his absence the transferee is bound by the state of the accounts between the mortgagor and the

(*f*) *King v. King*, 3 P. W. 358; *Yates v. Aston*, 4 Q. B. 182.

(*g*) Per Lord Thurlow, *Ancaster v. Mayer*, 1 Bro. C. C. 464; per Sir T. Plumer, *Quarrell v. Beckford*, 1 Mad 278.

(*h*) It was said to be a common practice in Wales to make mortgages in this manner with design to keep the

estate for ever in their own family. (Pre. Ch. 425.)

(*i*) See *Orde v. Hemming*, 1 Vern. 418; *Yates v. Hambly*, 2 Atk. 363; *Longuet v. Scawen*, 1 Ves. 403; *Fenwick v. Reed*, 1 Mer. 125; *Teulon v. Curtis*, Younge, 610; *Balfe v. Lord*, 2 Dr. & War. 480.

(*j*) See *Howell v. Price*, 1 P. W. 291; *Longuet v. Scawen*, *supra*.

transferor, whatever may have been the representations of the latter to the transferee, and though the latter have no notice of the discharge of any part of the debt; and, as the amount of the debt and not the nature of the estate—which is only the security for it—is the subject for consideration, the possession by the transferee of a legal interest in the estate does not strengthen the transferee's position (*h*) (**1495**).

The transferee is also in no better position than the mortgagee, when the mortgage deed is absolutely void from the beginning, although he took for valuable consideration and without notice of the fraud (**1022**); but where the security was only voidable originally it may become valid in the hands of such a transferee (*l*) (**341**).

It is usual upon transferring a mortgage to make a separate assignment of the debt, when the mortgagor is not a party; or when, being a party, it is desired to show an intention that the original debt shall be kept alive for the protection of the new mortgagee, or a purchaser of the estate, against mesne incumbrances (**1300**). The benefit of the debt, however, passes by the transfer of the estate (*m*), for it is only by payment of the debt that the estate can be taken from the trans-

(*h*) *Bradwell v. Catchpole*, 3 Sw. 78, n.; *Matthews v. Walwyn*, 4 Ves. 118; *Chambers v. Goldwin*, 9 Ves. 254.

(*l*) In the case of *Judd v. Green*, 33 L. T., N. S. 597, it was held that the case of the plaintiff, who sought to set aside a mortgage for fraud, failed on the evidence. It was, therefore, unnecessary for the purposes of the decision to consider what would have been the position of the transferee if the alleged fraud had been established against the original mortgagee. The Vice-Chancellor, however, discussed the question at some length, and expressed a strong opinion that, assuming the existence of the alleged fraud, the right of the transferee for value without notice would have prevailed against the mortgagor; relying upon the judgment of Lord Cottenham in *Aldborough v. Trye*, 7 Cl. & Fin. 436, and *George*

v. Milbank, 9 Ves. 190, cited there. But in *Aldborough v. Trye*, the fraud not being proved, the only objection which remained was that the deed was voluntary, and it was held that one who puts into the hands of another the means of obtaining money from a third person, cannot have relief without repayment of the money thus obtained; a principle which, it is submitted, does not apply when the mortgage was void *ab initio*, and when the act of the mortgagor was not deliberate, but was induced by fraud; and the Vice-Chancellor himself admitted, that if the mortgage was void from the beginning, the case of *Parker v. Clarke*, 30 Beav. 54 (**1022**) would be an authority for excluding him from all benefit.

(*m*) *Jones v. Gibbons*, 9 Ves. 411, per Sir W. Grant.

freee; as, on the other hand, if the debt be assigned and the assignment refer in terms to the security, the benefit of the security will pass (*n*).

7. A PLEDGE or PAWN is a security under which, by virtue of an actual or constructive delivery and possession of a personal chattel, or of prior possession supported by contract, a *special* property only is vested in the pawnee, as a security for a debt or engagement (*o*) (80). Upon nonpayment at the day (if any be fixed) the absolute property does not vest in the pawnee, and the pawnor, after tender, may sue for the chattels (*p*); and in certain cases has also an equitable right to redeem, unless the pawnee have properly sold the pledge under the power of sale which is incident to his security (*q*) (793).

8. An HYPOTHECATION (in the English law) vests in the creditor neither an absolute nor a special property (*r*) nor any

(*u*) Smith, Ex parte, Mannings, Re, 2 D. & C. 271, per Sir G. Rose.

(*v*) See judgment of Holt, C. J., in *Coggs v. Bernard*, Lord Raym. 909; Story, Bailm. s. 297.

(*w*) Com. Dig. 5, 149; Story, Bailm. ss. 345, 346. See Glanv. bk. 10, cc. 6, 8.

(*x*) *Pothonier v. Dawson*, Holt, N. P. R. 385; *Kemp v. Westbrook*, 1 Ves. 278; Story, Bailm. ss. 308, 309.

(*y*) Under the Roman civil law the *hypotheca* passed the legal interest in the security, whether it were moveable or otherwise, without possession: hence the remedy could be by judicial process only. The *pignus* required possession by the creditor, and that being given, it is said to have been applicable to immoveable as well as to moveable property. (Colquh. §§ 1463—1465.) The *hypothèque* of the French law affects only immoveable property used in commerce, its immoveable accessories, and their usufruct. It is divided into legal, judicial and conventional hypothèques, the two former of which answer to certain of our forms of equitable lien

and to judgments. And it does not affect moveable property. (Code Civil, §§ 2114—2120.) In this last particular it agrees with the laws of most of the continental states of Europe, of the United States of America and of Scotland and England (Burge, iii. 573); setting aside as to the latter the exceptional form of hypothecation mentioned above.

The same rule obtained under the *Coutumes de Paris* and the *Coutumes de Normandie*, and is still current in Jersey (*Hayley v. Bartlett*, 14 Moo. P. C. 251; *Horlock v. Nugent*, Cook v. Dodd, in the Royal Court of Jersey, id.). the laws of which island and of Guernsey follow the customs of Normandy. The *gage* of the French law agrees with our pledge in requiring that the security be delivered to and remain in the possession of the creditor, or of a third person appointed by the parties; but it requires a registered instrument (Code Civil, §§ 2074—2076), whereas no writing is required by the law of England for the validity either of a mortgage or a pledge of chattels.

In the British colonies, except British

right of possession, but a right of realization by judicial process in case of nonpayment of the debt at the time fixed (*s*).

This kind of security may be:—

1. An ORDINARY HYPOTHECATION, in the form of—

A *charge* upon property, which does not imply a personal debt, but confers a mere right of realization by judicial process, and in some cases a power of distress.

This is sometimes created by contract and sometimes by the mere mandate of the owner of the property charged; or,

An *equitable assignment* (*t*), which is an appropriation, for the payment of a debt, of property of the debtor in the hands of a third person; and is effected either by agreement or by an order upon the holder of the property, which binds him after notice in equity and after notice and assent at law (*u*) (110).

2. A MARITIME HYPOTHECATION, which includes—

The contract of *bottomry*, by which a ship and freight, with the cargo (if necessary), are made liable by the master as the agent of the owner, failing other resources, for the payment, within a certain time after the safe arrival of the ship at her destination, of a debt contracted to supply what is

Guiana, the Cape of Good Hope, Ceylon, St. Lucia, Lower Canada and Trinidad, the law of England on the subject of mortgages (subject to local modifications) generally prevails. (3 Burge, Col. Law, 277.) In the three former colonies the Roman Dutch law, in St. Lucia and Lower Canada the custom of Paris, and in Trinidad the law of Spain is in force. Guernsey and Jersey retain the customs of Normandy, and the Mauritius the Code Civil. (1 Id. xiv.; and see chapters 12 and 17 as to the colonial laws concerning mortgages and pledges. See also Bentinck v. Willink, 2 Hare, 1, as to mortgages in British Guiana.)

(*) See judgment of Holt, C. J.,

Johnson v. Shippen, 2 Lord Raym. 982; Stainbank v. Fenning, 11 C. B. 51; Stainbank v. Shepard, 17 Jur. 1032.

(*t*) This definition does not apply to absolute assignments in writing under the hand of the assignor, not purporting to be by way of charge only. Such assignments now transfer the legal right in the property which they affect, and are therefore not strictly hypothecations (115).

(*u*) See Smith v. Everett, 4 Bro. C. C. 63; Burn v. Carvalho, 4 M. & C. 690; Steward, Ex parte, 3 M., D. & De G. 265; Williams v. Everett, 14 East, 582; Bacon v. Husband, 4 B. & Ad. 611.

necessary for the preservation of the ship or the continuance of the voyage. It requires that there shall be a maritime risk, to be ascertained from the contents of the instrument, and it creates a debt (which is generally only treated as nominal) against the master, but none against the owner (*x*) (117).

The contract of *respondentia*, which is a like form of security upon the cargo only, founded upon the same necessity for the preservation of the property and governed by the same principles as the contract of bottomry (*y*), but binding (it is said) the borrower personally (*z*) (146).

9. LIENS (*a*) arise by operation of law, in the forms of—

1. Obligations established by the judgments or decrees of courts of justice giving the creditor no instant right of possession against the property of his debtor but enforceable against it by judicial process (151).
2. Obligations raised upon the consideration of a duty or implied intention on the part of the owner of pro-

(*x*) See *Atlas*, 2 Hag. A. R. 48; *Emancipation*, 1 W. Rob. Ad. 124; *Stainbank v. Shepard*, *supra*; *Jonathan Goodhue (Jones)*, Swab. 524; per Dr. Lushington, L. R., 1 Ad. 14.

(*y*) See per Dr. Lushington, *Cargo ex Sultan*, 5 Jur., N. S. 1060.

(*z*) 2 Steph. Blackst. 93, ed. 7.

(*a*) The use of the word "lien," which is a French word signifying "a tie," is of comparatively modern date in our law language. The right of retainer which was allowed by the English law, at least as early as the reign of Edward IV., is not mentioned by this name in the early reports; and the word "lien" appears not to have found its way into the law dictionaries so late as 1671 and 1672. Editions of *Termes de la Ley*, and of *Cowell's Interpreter*, printed in those years, do not contain it. The want of precision in its use is remarkable. A common law lien depends

upon retainer, and as there can be no retainer without possession, the word itself is often said to imply possession, although it appears to have no such force, and even at law is used to denote the right of a judgment creditor. But in equity it is used not only in the common law sense, and as implying an equitable right, not depending upon possession (such as the vendor's lien for the purchase-money of land), but is also often applied to equitable mortgages, and securities of a like nature, which rest simply upon contract. Although contracts are sometimes expressed to be made for mercantile liens, no actual liens are so conferred. The express stipulation and agreement for a security excludes the lien, and limits the rights by the extent of the express contract. *Expressum facit cessare tacitum*. Per Sir W. Grant, 2 Mer. 404; per Lord Westbury, L. R., 1 P. C. 305.

perty to make it answerable for a specific claim, not requiring or giving any right to possession by the creditor but enforceable by sale under judicial process (192).

3. Obligations also raised upon like equitable principles, but subjecting only personal chattels of a debtor, in some cases to general, in others only to specific, claims of his creditor, and in all cases so long only as he holds possession of them, the right of retainer being his sole remedy. To the validity of such liens possession was always as necessary in equity as at law (*b*) (252).

Of Legal Mortgages of Real and Chattel Real Estate.

10. In the legal mortgage (proper) of land, either for the whole freehold interest or for a term of years, and whether the term be created for the purpose of the security (*c*), by a mortgagor seised of the fee simple, or constitute his only interest in the estate, the property is conveyed or assigned by the mortgagor to the mortgagee, in a form like that of an absolute legal conveyance, but subject to a condition that upon payment of the debt at a certain time, the conveyance shall be void; or to a proviso that in the like event the property shall be reconveyed. It is also usual to insert a covenant to repay the

(*b*) *Gladstone v. Birley*, 2 Mer. 403. Per Sir W. Grant, *Molesworth v. Robins*, 2 Jo. & L. 358; *Pelly v. Wathen*, 7 Hare, 351; 1 De G., M. & G. 16—23; *Bozon v. Bollaud*, 4 My. & C. 354, relating to the lien of the solicitor; and see the observations of Turner, L. J., disapproving of a remark attributed to Wigram, V.-C. (7 Hare, 304), to the effect that the lien was like an equitable mortgage. (7 De G., M. & G. 339; 1 Jur., N. S. 666.)

(*c*) The practice for owners of the fee to mortgage for a long term of years was originally adopted to avoid the liability of the estate, after condition broken, to dower and other legal charges upon the estate of the mortgagee; a

reason which has long since ceased. The mortgage for a term has the advantage of keeping together the estate and the debt when the mortgagee dies intestate, but of course he can only acquire the term by foreclosure, and can assign no more upon a sale; and the reversion of the owner of the estate carries the right to the deeds relating to the inheritance. The plan is still necessarily adopted where money is raised by trustees of a term; but in securities made by the owner of the fee it has almost fallen into disuse. The personal representative of the intestate mortgagee of the fee may also now reconvey or surrender. (V. & P. Act, 1874, s. 4.)

principal upon the day fixed for repayment in the proviso for redemption, and to pay interest in the meantime, together with other provisions to be hereafter noticed, but none of these are necessary parts of a mortgage (1112).

If the mortgage be made by way of condition, the legal estate passes to the mortgagee, but will be defeated by the performance of the condition; and upon non-performance thereof, the estate of the mortgagee becomes absolute, and in law was formerly irredeemable (*d*). If the mortgage be made with a proviso for reconveyance, the estate, so far as it is not redemised to the mortgagor until default in payment, passes to the mortgagee, subject to the proviso; and in case of non-payment on the appointed day was also formerly irredeemable at law (*e*). When, either in the case of a mortgage by way of condition, or with a proviso for reconveyance, the estate of the mortgagee has become absolute, an equitable right of redemption arises (which is commonly called the EQUITY OF REDEMPTION) (1166), upon the consideration that the object of the transaction is merely to create a security for a debt (*f*) (1164).

11. The Welsh mortgage (5), by which the estate is conveyed to the creditor without condition or proviso, the rents and profits being enjoyed by him in lieu of interest, contains no covenant, express or implied (583), for payment, and gives no right to sue for a debt; though on failure in payment, upon any particular day which may be named for payment, there may be a right to bring ejectment (*g*).

This kind of security differs much in its consequences, as well as in its form, from the common mortgage, because it carries a right to redeem, but none to foreclose, for being without condition there can be no forfeiture (*h*), and it is only after forfeiture that the mortgagor's right is barred by foreclosure (*i*). The possession of the mortgagee is of the very

(*d*) Co. Litt. 205a, note 1.

(*e*) Doe *d.* Roylance *v.* Lightfoot, 8 M. & W. 573.

(*f*) Sparrow *v.* Hardcastle, 3 Atk. 759, per Lord Hardwicke; Seton *v.* Slade, 7 Ves. 261, per Lord Eldon.

(*g*) Howell *v.* Price, Pre. Ch. 423, 477.

(*h*) Balfe *v.* Lord, 2 Dru. & War. 480.

(*i*) Bonham *v.* Newcomb, 1 Vern. 232. An equitable mortgagee may often foreclose though there be no actual forfeiture, and even no condition. But

essence of the Welsh mortgage, and every receipt of rent is a receipt by virtue of the contract of so much interest. Hence a Welsh mortgage was held to be redeemable under the old law of limitation, until the lapse of twenty years from the time when the mortgage was fully satisfied (*h*); and in this particular it seems that the modern Statutes of Limitation have made no difference (1196).

Sometimes the contract differs in form from the common Welsh mortgage, as by a stipulation that the mortgagee shall repay himself both principal and interest out of the rents and profits. But it seems that if such a contract have the principal requisites, it will also have the effect of the common Welsh mortgage (*l*); and the presence of a covenant to pay the principal and interest on demand is not (*m*) such a limitation of the time for payment as to lead to forfeiture, and so to let in foreclosure. But if there be such a covenant, and no stipulation for the receipt of the rents and profits by the grantee, the security will not have the character of a Welsh mortgage, the presence of the stipulation and the absence of a condition being alike necessary to every form of that security. And unless the terms of the instrument exclude such a construction, the presumption will be that the deed was meant to operate as an ordinary mortgage. This presumption will be strengthened if the debt be also secured by bond and judgment (*n*); for it would be absurd to suppose that any other property of the debtor should be liable to be taken for the debt, and not the estate which was specifically pledged for its payment.

12. The absence in a common mortgage of the covenant for payment of the debt, does not however of itself affect the trans-

this is by analogy, the equitable mortgagee being entitled to call for and to have the same remedy as if he had obtained a legal mortgage.

(*h*) *Yates v. Hambly*, 2 Atk. 363; *Longuet v. Scawen*, 1 Vcs. 403; *Fenwick v. Reed*, 1 Mer. 125.

(*l*) *Orde v. Hemming*, 1 Vern. 418.

(*m*) *Teulon v. Curtis, Younge*, 610. Sec S. C., nom. *Curtis v. Holcombe*, on

suit for redemption, 6 L. J., N. S., Ch. 156.

(*n*) *Balfe v. Lord*, 2 Dru. & War. 480. In *O'Connell v. Cummins*, 2 Ir. Eq. Rep. 251, a demurrer was allowed to the mortgagee's bill, the proviso for redemption being for payment at any time: which was considered to be of the nature of a Welsh mortgage.

action as a mortgage; though it has been thought to be material where the absence of the covenant may be explanatory of the intention of the parties. Thus, in the case of a lease by the mortgagee to the mortgagor for a long term, at a rent, with a proviso for re-conveyance if the mortgage money and interest were paid within three years, the absence of a covenant for repayment of the mortgage money was held to show that after the three years the interest was to be irredeemable, and that the intention was to purchase the interest absolutely by way of rent-charge: and the transaction, being fair, and different from an attempt to fetter the redemption in the land itself, was upheld (*o*) (1188). So a conveyance by a debtor to a trustee (the creditor being a party), in trust out of the annual proceeds to pay head rent and insurance premiums, and to pay creditors their principal and interest by instalments, and then to reconvey, and which contained no covenant for payment by the debtor, was held (*p*) not to be a mortgage entitling the creditors to foreclosure or sale; though if there had been such a covenant, the decision would probably have been otherwise.

13. And while the courts protect the *bonâ fide* purchaser against stale demands, or other pretences that only a mortgage was intended, they also take care that a borrower shall not suffer from the omission, in a deed or agreement, of the usual requisites of a mortgage, if those requisites have been omitted by positive fraud, mistake, or accident.

An instrument which purports to be an absolute conveyance may therefore be construed as a mortgage—

- (1.) If there be evidence of the non-execution or erasure, by mistake or fraud, of an intended defeasance or proviso for redemption (*q*).
- (2.) If a separate defeasance or agreement for a right of redemption have been made by the mortgagee or his

(*o*) King v. King, 3 P. Wms. 358;
Goodman v. Grierson, 2 Ba. & Bc. 278;
Mellor v. Lees, 2 Atk. 494; Floyer v.
Lavington, 1 P. Wms. 268.

(*p*) Taylor v. Emerson, 4 Dru. &
War. 117. See Holmes v. Matthews,

3 Eq. Rep. 450.

(*q*) Anon., cited in Maxwell v.
Mountacute, Pre. Ch. 526; England v.
Codrington, 1 Eden, 169; A. G. v.
Crofts, 4 Bro. P. C. 136; Card v.
Juffray, 2 Sch. & Lef. 374.

duly authorized agent either in writing or verbally (*r*).

- (3.) If it appear from recitals in, or by inferences drawn from, the contents of other instruments, or from the payment of interest or other circumstances, that the conveyance was intended to be redeemable (*s*).

And parol evidence will be admitted to show the omission of a defeasance or proviso for redemption, if, but not unless, the omission be alleged to have been obtained by fraud (*t*).

The mere existence, in a deed not executed by the grantee, of a recital that a former absolute conveyance to him was intended to take effect as a mortgage, will not give a right of redemption after the lapse of many years and the death of the grantee, although the deed had been in his possession and he held other property by virtue of it (*u*).

If an absolute conveyance be made with a separate defeasance, in order, by concealing the defeasance to commit a fraud, the defeasance will be void as against an absolute purchaser who had no notice of the fraud (*x*).

If a mortgage has been fraudulently made to appear as an absolute security, it will not be corrected at the instance of those concerned in the fraud (*y*).

An instrument which contains a trust for sale in case of non-payment of the debt at a certain time, may be treated as a mortgage, if it appear from the circumstances and from the tenor of the instrument that it was intended to be so (*z*); but a conveyance containing such a trust may be redeemable without being a mortgage under which a forfeiture would take place (*a*).

(*r*) *Francklyn v. Ferne*, Barn. Ch. 30; *Clench v. Witherley*, Ca. t. Finch, 376; *Manlove v. Bale*, 2 Vern. 84; *Whitfield v. Parfitt*, 15 Jur. 852; *Lincoln v. Wright*, 4 De G. & J. 16.

(*s*) *Maxwell v. Mountacute*, Pre. Ch. 526; *Cripps v. Jee*, 4 Bro. C. C. 471; *Sevier v. Greenway*, 19 Ves. 413; *Allenby v. Dalton*, 5 L. J., Ch. 312.

(*t*) *Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Dixon v. Parker*, 2 Ves. 219, per

Lord Hardwicke; *Lincoln v. Wright*, 4 De G. & J. 16.

(*u*) *Tull v. Owen*, 4 Y. & C. 192.

(*x*) *Webber v. Farmer*, 4 Bro. P. C. 170.

(*y*) *Baldwin v. Cawthorne*, 19 Ves. 166.

(*z*) *Chambers v. Goldwin*, 5 Ves. 834; *Bell v. Carter*, 17 Beav. 11.

(*a*) *Sampson v. Pattison*, 1 Hare, 533; *Jenkin v. Row*, 5 De G. & S. 107.

A mortgage may be created by a deed duly executed, though it be retained by the debtor without communication with the creditor, unless it be shown that there was fraud in the execution, or that it was delivered as an escrow, and intended to operate conditionally (*b*).

But an intention to make a mortgage will not be lightly inferred if it be not expressed, especially where possession has gone with the conveyance, and there has been a long acquiescence. Hence a covenant by the grantor, not to make partition without the advice and consent of the grantee, has been held (*c*) not to turn a conditional sale into a mortgage.

14. Although in certain cases conveyances apparently absolute may thus be construed as mortgages, an absolute conveyance with an agreement for repurchase, or that the conveyance shall be void upon payment of a certain sum at a fixed time, will create a mere right of repurchase to be exercised only according to the strict terms of the power, and not such a right of redemption as is incidental to a mortgage (*d*); unless it appear that the transaction was in the nature of a mortgage security, and that the grantor and grantee were intended to have mutual and reciprocal rights to insist upon reconveyance of the estate and repayment of the consideration (*e*).

In such a transaction the condition for repurchase, unlike the proviso for redemption, is construed strictly against the grantor, who, if he desire the benefit of it, must show compliance with its terms (*f*). And the reason of the difference is that, in a mortgage, the penalty or forfeiture is introduced for the purpose of security only, and the mortgagee is compensated by receiving interest in default of payment of the principal at the time appointed. But in the case of a defeasible purchase, forfeiture is out of the question, the estate being absolutely vested in the

(*b*) *Exton v. Scott*, 6 Sim. 31.

(*c*) *Cottrell v. Purchase*, For. 61.

(*d*) *St. John v. Wareham*, cit. 3 Sw 631; *Barrell v. Sabine*, 1 Vern. 268
Ensworth v. Griffiths, 5 Bro. P. C. 184
Perry v. Meddowcroft, 4 Beav. 197.

(*e*) *Goodman v. Grierson*, 2 Ba. & Be. 274; *Alderson v. White*, 2 De G.

& J. 97; 4 Jur., N. S. 125; *Taply v. Sheather*, 8 Jur., N. S. 1163; *Shaw v. Jeffry*, 13 Moo. P. C. 432.

(*f*) See 3 Sw. 631; *Pegg v. Wisden*, 16 Beav. 239; *Barrell v. Sabine*, 1 Vern. 268; *Joy v. Birch*, 4 Cl. & F. 57; 10 Bl., N. S. 201.

grantee by the conveyance; and the power to repurchase, not being a right arising out of the nature of the contract, but a privilege given by special agreement, is to be exercised only on strict performance of the terms of the deed.

Therefore, where in one case it was agreed at the time of the conveyance (*g*), that the premises should be reconveyed by the purchaser on payment of the original consideration money and the expenses of the conveyance, within a limited time; and in another (*h*), after an absolute release of the equity of redemption to the mortgagee, for a further sum, the mortgagee (being then in the position of a purchaser) demised the estate to the former mortgagor for a term, at a rent, and agreed at the same time that, upon punctual payment of the rent, the estate might be repurchased at a fixed price, and within a certain time; but in default of payment of the rent, the agreement was to be void:—it being clear in these cases that there was no mutuality, in other words, that the purchasers had no means of compelling the repayment of their consideration monies, but that the power of repurchase was a privilege only—redemption was refused in the first case after the period fixed had passed, and repurchase in the other within the period, but upon default of payment of the rent, though the arrears due were tendered with the purchase money. The strict condition has also been upheld where (*i*), upon the release of the equity of redemption for valuable consideration, it has been agreed that the mortgagee should reconvey upon repayment to him within a fixed time of the original mortgage money, with the consideration for the release and interest and the outlay for repairs or improvements; and where time was allowed for payment of an existing debt upon security being given for payment of it by instalments, on the failure of any one of which the whole debt was to become payable (*k*). So if the creditor agree to forego part of his debt upon payment of

(*g*) *Williams v. Owen*, 10 Sim. 386 and 5 Myl. & Cr. 303; *Acton v. Acton*, Pre. Ch. 237; 2 Eq. Ca. Abr. 595; but see *Waters v. Mynn*, 14 Jur. 341.

(*h*) *Davis v. Thomas*, 1 Russ. & M.

506; *Tam*. 416; so in *St. John v. Wareham*, cited 3 Sw. 631.

(*i*) *Ensworth v. Griffith*, 5 Bro. P. C. 184; *Gossip v. Wright*, 9 Jur., N. S. 592.

(*k*) *Sterne v. Beck*, 32 L. J., Ch. 682.

the residue at a fixed day; or to refrain from entering up judgment if an insurance be kept up: the latter contract is not in the nature of a penalty or forfeiture, and the creditor may take advantage of failure in the strict performance of it; and in the former no relief will be given in case of default, but the mortgagee will be entitled to the whole of his original demand, notwithstanding continued payments of interest on the lesser sum (*l*).

And so where the transaction is entirely carried out by the instrument of conveyance, if the grantee have no power of compelling the repayment; as upon a conveyance of a reversionary interest in leaseholds (*m*), with a proviso for redemption upon repayment of the consideration money and interest within five years, but in default, the estate of the grantee to be absolute and indefeasible, and the grantor to be debarred for ever from all right and relief in equity; with a covenant by the grantor to release his equity. It seems clear that even these strong expressions of intention would not have availed, if any power of compelling repayment had been reserved to the grantee. And where (*n*) a mill, with the fixtures and business, were assigned to the equitable mortgagee thereof at a certain price (the business to be carried on by him), with a clause for resale within ten years, and a proviso that if the net profits of the business should not during six consecutive months at any period of the ten years produce such an amount as to pay the interest on the purchase-moneys, and if the assignor should, within two months after notice, fail to pay the assignee the purchase-money, with interest, or in case the purchase-moneys and interest should not be wholly repaid by the end of ten years, then the agreement for reconveyance should be void, and the equity of redemption barred; this was held to be a sale with a right to demand a resale, the grantee having acquired no personal rights against any one, and having no means, other than those pointed out by the deed

(*l*) *Ford v. Earl of Chesterfield*, 19 Beav. 428; *Thompson v. Hudson*, L. R., 4 E. & I. App. 1; *Parry v. Great Ship Co.*, 4 B. & S. 556.

(*m*) *Tasburgh v. Echlin*, 2 Bro. P. C. 265.

(*n*) *Ogden v. Battams*, 1 Jur., N. S. 791.

(viz. the waiting the expiration of the time limited), for making himself master of the property.

Upon an agreement by one who had contracted to buy an estate, that it should be conveyed to a person who had advanced him part of the purchase-money, with a proviso to be void on repayment of the advances with interest, and of the whole amount of the purchase-money at a certain day, otherwise the sale to be absolutely confirmed to the lender, the transaction was also held to be a conditional sale (*o*).

It is the same if there be a conveyance of land conditioned to be void on payment of a sum of money at a certain day; for it is in the election of the settlor either to pay the money or to let the settlement stand, but not in that of the grantee to compel payment (*p*).

15. The inadequacy of the consideration to the value of the property, the taking by the grantee of immediate possession under the conveyance, and the payment by him or by the grantor of the costs of the transaction or of insurances and other outgoings of the property, will be taken into consideration, but will not be conclusive upon the question whether a doubtful instrument was intended to take effect by way of mortgage or of sale (*q*). And circumstances of pressure upon the grantor, as where he is insolvent and in prison, or represented by the same solicitor as the grantee, will materially influence the court in construing an apparently absolute or conditional sale, as a mortgage, where, in the absence of such circumstances, the mere insufficiency of price would be little regarded. Weight will be also given to the circumstance that, in the peculiar position of the grantor, a mortgage might be beneficial to him when a sale would not (*r*).

(*o*) *Perry v. Meddowcroft*, 4 Beav. 197.

(*p*) *King v. Bromley*, 2 Eq. Ca. Abr. 595; and see *Ensworth v. Griffith*, 5 Bro. P. C. 184.

(*q*) *Thornborough v. Baker*, 3 Sw. 681, per Lord Nottingham; *Williams v. Owen*, 5 M. & C. 303; *Langton v. Horton*, 5 Beav. 9; *Douglas v. Culver-*

well, 3 Gif. 251; 31 L. J., N.S., Ch. 543, per Turner, L. J.; *Davis v. Thomas*, 1 R. & M. 506; nor will payment of the expenses by the grantor be conclusive evidence of an intended mortgage. (*Alderson v. White*, 4 Jur., N. S. 125; 2 De G. & J. 97.)

(*r*) *Fee v. Cobine*, 11 Ir. Eq. Rep. 406.

It may be shown, that a contract that a conditional sale should become absolute upon the happening of a certain event, was entered into by the grantor with the full knowledge of the consequences (*s*), and what was the nature of an instrument uncertain upon the face of it (*t*); but such evidence will not be allowed to affect an inference that the transaction, though in form a sale, was only a mortgage, where that inference is founded upon strong circumstances. Thus, where a debtor gave to his creditor an absolute bill of sale of a ship at sea, and deposited with him a policy of insurance thereon, and drew bills upon him for further sums, engaging but failing to pay them when they came to maturity, and the bills were renewed at the expense of the debtor, and the insurance was kept up and payments made by him on account of the crew: these facts were held to be consistent with, and evidence of, a mortgage, and not of a conditional sale intended to become absolute upon non-payment of the bills, although parol evidence was given by the creditor that the agreement was otherwise (*u*).

16. Somewhat akin to the case of a conditional sale is that of a condition in a settlement, that, upon payment of a sum of money in a certain event, the prior limitations of an estate shall cease, and the land go to the person paying the money; as where (*x*) land was settled upon the issue of the intended marriage in tail, with a proviso that if there should be but one daughter and no other child of the marriage the land should be to the husband in fee, upon payment to the trustees of the settlement of a sum of money by his heirs, executors or administrators, within three months after his death. The event having happened, this was held to be only a security for money, and to be redeemable after the three months; and that, not merely by the heir or executor, but also by a creditor of the husband. But it will be different (*y*) if the proviso be that, unless (in the happening of the event) the person entitled under

(*s*) *Newcomb v. Bonham*, 1 Vern. 8, 214, 232.

(*t*) *Langton v. Horton*, 5 Beav. 9.

(*u*) *Id.*

(*x*) *Frederick v. Aynscombe*, 2 Eq.

Ca. Abr. 594, M. N.; 1 Atk. 392.

(*y*) *Mans.* (Sir Thomas) case cited, *Freem.*, Ch. 206; *Winchelsea*, *Earl v. Wentworth*, 1 Vern. 402; *Same v. Norcliffe*, *id.* 430.

the limitation pay to another a certain sum within a limited time, the land shall go over to the latter in fee; for here there is a limitation over upon default of payment at the appointed day, to treat which as redeemable would destroy the distinction between a condition and a limitation over.

17. It follows from what we have seen of the nature of foreclosure, that in these cases of conditional sales and settlements, there being no power in the person to whom the money may be paid to compel payment of it, and no forfeiture, but a permissive right of payment only, there can be no foreclosure (5).

18. Another kind of redeemable interest is that in which the person to whom the consideration money is paid grants, not the estate, but an annuity or rent-charge issuing thereout, with a clause of repurchase. Transactions of this kind were originally made (where loans were intended) for the purpose of avoiding the Statutes of Usury, and are now of common occurrence. The effect of the transaction is somewhat of the nature of a Welsh mortgage, the money borrowed being repaid by instalments, consisting partly of interest and partly of principal (z) (11).

The tendency of the court is to treat annuities, thus granted with a power of repurchase, as redeemable annuities, and to admit unwillingly the distinction between redemption and repurchase in cases in which the grant of the annuity and the stipulation for repurchase form part of the same transaction; especially if the words "redemption" and "repurchase" appear to have been used synonymously; but the word "repurchase" will be construed with the strictness of a condition, where the grantee has been for some time in possession as purchaser (a).

The presence of a stipulation that notice shall be given of the intention to repurchase, and the condition for repayment

(z) *Floyer v. Sherard*, Amb. 19; *Lawley v. Hooper*, 3 Atk. 281. But this seems to be the only resemblance, for possession is not of the essence of

the transaction, and foreclosure may be had.

(a) *Longuet v. Scawen*, 1 Ves. 403; *Bulwer v. Astley*, 1 Ph. 422.

of the purchase-money, with a further sum amounting to the value of the interest during the period of notice, are also circumstances (*b*) upon which the court will rely, as indications that a loan was intended, and that the object was to allow time to find another borrower, and to secure interest in the meantime; though the latter condition was one upon which Lord Redesdale thought that much stress ought not to be laid (*c*).

19. A legal mortgage of a copyhold estate is effected by a surrender of the copyhold, subject to a condition that the surrender shall be void upon payment of the money at the day fixed; and which is perfected by the admittance of the mortgagee. When the copyhold only forms part of the security, the surrender is usually made in pursuance of a covenant to surrender (*d*), contained in the accompanying mortgage of the freehold or leasehold estate, and the covenants for title in which are made to extend to the copyholds; or, if there be no such other security, the covenants for payment and title, if made, are alone contained in a separate deed. Until entry upon the court rolls of the conditional surrender, nothing passes by it (*e*); but this having been done, the mortgagee generally abstains from taking admittance until it becomes necessary or desirable to do so, and in the meantime the fines and fees which would become payable upon his admittance are saved, and he does not become subject to the liabilities incident to copyhold tenancy. His interest, in fact, until admittance, is merely equitable, the surrenderor remaining seised of an estate which is descendible to his heir (even though the lord have accepted rent from the surrenderee (*f*)), and being liable to the lord both for services and for the purpose of forfeiture (*g*). Nor

(*b*) *Lawley v. Hooper*, 3 Atk. 281; *Bulwer v. Astley*, 1 Ph. 422.

(*c*) *Verner v. Winstanley*, 2 Sch. & Lef. 393.

(*d*) The interest of the covenantee under such a covenant may be assigned, and the assignee will be entitled to admittance on payment only of a single fine, even though the agreement to assign be presented by the homage. (*The King v. Lord of the Manor of Hendon*, 2 T. R. 484.)

(*e*) *Burgaine v. Spurling*, Cro. Car. 283; *Frosel v. Welsh*, Cro. J. 403; *Fawcet v. Lowther*, 2 Ves. 303; 4 & 5 Vict. c. 35, s. 90.

(*f*) *Frosel v. Welsh*, Cro. J. 403.

(*g*) *Doc d. Shewen v. Wroot*, 5 East, 132; *Floyd v. Aldridge*, cited id. 137; *The King v. Mildmay*, 5 B. & Ad. 254; *Pow. Mort.* 438 a, note, ed. 6; 2 *Watk. Cop.* 117. See *Fawcet v. Lowther*, 2 Ves. 303; *Minton v. Kirwood*, L. R., 1 Eq. 449.

can the lord, except by special custom, compel the mortgagee to take admittance either before or after condition broken (*h*), though if by custom the lord may insist upon it and a forfeiture be incurred, there will be no relief in equity against the forfeiture (*i*).

Upon breach of the condition and admittance of the surrenderee, his estate becomes absolute; and having already before admittance acquired a good title as against all but the lord, he takes upon admittance a title which relates back to the date of the surrender; so that he may recover in ejectment against a purchaser who has taken admittance under a later surrender (*k*).

The lord is not bound to accept a conditional surrender which is embarrassed with trusts, unless it be warranted by custom, or to recognize persons over whom he has no control, or give effect to a transaction to which he is not a party. He may therefore refuse a surrender made subject to such uses as the surrenderee shall appoint by writing, though if he have accepted such a surrender he will be bound by it (*l*). And he must admit an appointee under a power created by will.

20. Copyholds for lives are also usually mortgaged by way of conditional surrender, although in strictness the surrender of such copyholds, except under a special custom, is a renunciation of the copyhold estate for the lord's use, without any obligation upon him to regrant it; so that on admittance the tenant would take from the lord and not from the surrenderor, as in the case of copyholds of inheritance (*m*).

21. In mortgaging leaseholds for years it is usual, instead of assigning the whole term to the mortgagee, to grant him an

(*h*) Watk. Cop. 1, 148, n.

(*i*) Tredway v. Fotherley, 2 Vern. 367; Scriven, Cop. 1, 195.

(*k*) Holdfast d. Woollams v. Clapham, 1 T. R. 600; The King v. Mildmay, supra; Benson v. Scott, 12 Mod. 49; Doe d. Wheeler v. Gibbons, 7 Car. & P. 161.

(*l*) Eddleston v. Collins, 3 De G., M. & G. 1; Flack v. Master, &c. of Downing College, 13 C. B. 945.

(*m*) Watk. Cop. 1, 51, note (1). In mortgages of estates for lives, whether copyhold or leasehold, it is usual by way of further security for the mortgagor to insure the lives of the *cestuis que vie*. But where money is raised by the direction of the Court of Chancery upon such property, the court has no power to compel the persons entitled to insure the lives. (Grantley v. Garthwaite, 6 Mad. 96.)

underlease, reserving to the mortgagor a few days or some other nominal reversion out of the original term; because if the whole of that term be legally vested in the mortgagee, he becomes liable as assignee to be sued by the lessor on the lessee's covenants, whether the mortgagee have or have not entered into possession of the estate (*n*); though it was formerly thought, that until entry and possession, an assignment by way of mortgage was on a different footing in this respect from an absolute assignment (*o*).

Even though the security had been of no value to the mortgagee, he was not relieved in equity against the action of the lessor (*p*); who, on the other hand, was left to his legal remedy and was not assisted to charge the mortgagee (*q*).

The liability to the covenants, being thus dependent upon the legal ownership, attaches neither to the mere equitable interest of a devisee or other assignee of the estate of the mortgagor, nor to that of an equitable mortgagee (*r*); nor has the lessor any equity to compel the equitable assignee or depositce, between whom and himself there is no privity, to take a legal assignment so as to make himself liable to the covenants; even though the equitable assignee have taken possession of the property; the effect of the possession being dependent upon the nature of the title under which it is taken (*s*).

Of Mortgages of Chattels Personal.

22. Personal chattels may be the subject of securities, for the validity of which no deed or writing is necessary (*t*); and which may be made either by way of mortgage, or by pledge (**69**).

(*n*) *Williams v. Bosanquet*, 1 Brod. & B. 238; 3 Moore, 500; *Stone v. Evans*, Peake, Add. Ca. 94; *Haig v. Homan*, 4 Bli. N. S. 380.

(*o*) *Eaton v. Jacques*, 2 Dougl. 455. See also *Walker v. Reeve*, 3 Dougl. 19.

(*p*) *Pilkington v. Shaller*, 2 Vern. 374.

(*q*) *Sparkes v. Smith*, 2 Vern. 275.

(*r*) *Mayor of Carlisle v. Blamire*, 8

East, 486.

(*s*) *Moores v. Choat*, 8 Sim. 508, overruling *Flight v. Bentley*, 7 id. 149; *Moore v. Greg*, 2 De G. & S. 304; 2 Ph. 717, overruling *Lucas v. Comerford*, 3 Bro. C. C. 165; 1 Ves. J. 235.

(*t*) Litt. s. 365; *Reeves v. Capper*, 5 Bing. N. C. 136; *Flory v. Denny*, 7 Exch. 581.

A mortgage of chattels, which, like an absolute assignment of them, is commonly called a bill of sale (59), passes the actual property in the goods to the mortgagee, subject to redemption. Like other mortgages it may be made subject to a condition; and the possession of the creditor is not, as in the case of a pledge (80), necessary for its validity (*u*). But as it is fraudulent by the rules of law (*x*) for the debtor to continue in possession of the goods mortgaged, because he is thereby invested with a delusive credit arising out of such possession, it was held in *Twyne's case* (*y*), soon after the passing of the statute against fraudulent deeds and alienations, that such possession was within the mischief aimed at by that act (343). It is therefore a rule (*z*), that where goods mortgaged are capable of delivery, there ought to be an actual delivery of them; but if the mortgagee cannot obtain possession either of the goods, or of such documents or muniments as will give him the dominion over them, he must give notice of his title to the person who has the dominion (887).

A provision that the mortgagor of goods shall remain in possession until default operates as a re-demise by the mortgagee, who cannot sue for the goods until default has been made or until the expiration of the time limited after notice, where notice for payment is to be given upon default; and the mortgagor may maintain an action for interference with his possession during the term. But the re-demise only entitles the mortgagor to the *use* of the chattels; if he or his trustee in bankruptcy sell them during the term, it will be a disclaimer of the tenancy, and the mortgagee or his assignees may sue in respect of the conversion (*a*).

23. It is not necessary for the validity of a mortgage of chattels that the mortgagor should be aware of their exact nature (*b*). He may even create a valid security upon per-

(*u*) *Maugham v. Sharpe*, 17 C. B., N. S. 443; 10 Jur., N. S. 989.

(*x*) Per Lord Hardwicke, 1 Atk. 167.

(*y*) 3 Co. 80.

(*z*) Per Sir Thomas Parker, C. B.,

in *Ryall v. Rolle*, 1 Atk. 176; and see *Lempriere v. Pasley*, 2 T. R. 485, as to mortgage of goods at sea.

(*a*) *Fenn v. Bittleston*, 7 Exch. 937; *Brierley v. Kendall*, 17 Q. B. 937.

(*b*) *Kelsall, Exp.*, De G. 352.

sonal property not yet in existence, provided he have a potential interest in that out of which the property may arise. Therefore, a parson may grant all the tithe wool which he may have in such a year, though perhaps he shall have none; and one possessed of land, the fruits which shall arise upon it; and the property shall pass as soon as the fruits are extant: though a man cannot grant the wool that shall grow upon his sheep that he shall buy hereafter, for that he hath it neither actually nor potentially (*c*). So a valid mortgage may be made of the produce to arise from a whaling voyage then in course of prosecution (*d*); and of the freight to arise under a future contract in respect of an intended voyage (*e*); and future freight may be mortgaged with the ship (*f*), and it seems also separately from it, so that the separation be not permanent, but only for the purposes of the security (*g*). But, for want either of an actual or potential interest, an assignment of the profits of a ship has been held not to pass at law the oil obtained on a voyage which was not contemplated at the date of the assignment (*h*).

24. An incomplete chattel may also be the subject of a security comprising a contract to complete it, and to assign the materials appropriated for its completion, and the chattel when finished; and by such a contract the entire chattel and all things prepared for, though not actually attached thereto, will be bound, and will vest in the assignee (*i*) (**347**).

25. But a mere grant of goods not in existence, or not then belonging to the grantor, was formerly (*k*) inoperative at law, unless the grant were ratified by the grantor after he had

(*c*) *Grantham v. Hawley*, Hob. 132; *Petch v. Tutin*, 15 M. & W. 110. An Act of S. Australia, 1855-6, No. 4, authorizes liens on future wool and mortgages of cattle, &c., without delivery.

(*d*) *Langton v. Horton*, 1 Hare, 549.

(*e*) *Leslie v. Guthrie*, 1 Sc. 683.

(*f*) *Douglas v. Russell*, 4 Sim. 524; 1 M. & K. 488.

(*g*) *Ship Warre, Re*, 8 Pr. 273, per Lord Eldon.

(*h*) *Robinson v. Macdonnell*, 5 M. & S. 228.

(*i*) *Reid v. Fairbanks*, 1 C. L. R. 787; *Woods v. Russell*, 5 B. & Ald. 942.

(*k*) I. e., before the Judicature Acts, 1873 and 1875. See Act of 1873, s. 25 (11).

acquired the property (*l*); such a ratification being sufficiently shown where the grantee took possession of the after-acquired property, with the consent of the grantor (*m*). Otherwise a legal security upon such property could be created only by a licence or authority to the creditor to take possession of it; by which licence, so long as it remained unacted upon, no legal title to any specific property was created; but when executed the mortgagee's title to the property taken, if it were so described that a specific performance of the contract could have been decreed, was as good as if he had been directly put into possession by the mortgagor himself (*n*). And an instrument, though plainly intended to take effect as an assignment, and void as such, may, if it contain apt words, be treated as a power to take possession of the after-acquired property. A security was so construed, which provided that after-acquired property should belong to the creditor, and be considered to be included in the assignment as fully as if it were the property of the debtor, and included in the deed, so that the security might at all times be of adequate value (*o*).

A subsequent assignment by the mortgagor, when the after-acquired property has come into his possession, and before it has been seized by the first mortgagee under the licence, amounts to a revocation of the licence (*p*).

26. In equity, on the other hand, upon the principle that specific performance would be decreed of a contract to assign, when property which answers the description in the contract comes into the possession of the mortgagor, an assignment of chattels not in the mortgagor's possession at the date of the assignment will pass an immediate interest, which will attach upon the chattels when they are acquired (*q*); and a licence under which in ordinary cases no interest would pass until the

(*l*) *Swan v. Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B. 850.

(*m*) *Hope v. Hayley*, 5 El. & Bl. 830.

(*n*) *Congreve v. Evetts*, 10 Exch. 298; *Holroyd v. Marshall*, 2 Sm. & G. 382; 29 L. J., Ch. 656; 30 id. 386; 33 id. 198; 10 H. L. C. 191; *Belding v.*

Read, 11 Jur., N. S. 547; 3 H. & C. 955.

(*o*) *Hope v. Hayley*, 5 El. & Bl. 830.

(*p*) *Carr v. Acraman*, 11 Exch. 566.

(*q*) *Holroyd v. Marshall*, *supra*; *Reeve v. Whitmore*, 9 Jur., N. S. 243, 1214; 33 L. J., Ch. 63.

chattels were seized by virtue of it, may, upon the construction of the instrument in which it is contained, operate as a present assignment (*r*).

The distinction between the legal and equitable effects of the grant will probably now be unimportant.

27. Questions whether and to what extent securities upon chattels were intended to affect more than the present property of the grantor, most frequently arise in mortgages of furniture and stock in trade, and of the machinery and fixtures contained in manufactories; the chattel or other nature of which latter has also been the cause of much discussion.

In considering these questions, it may be premised that, where property is purely of a moveable nature, a clear intention must be expressed or implied in the security to affect such as is subsequently acquired or brought upon the mortgaged premises. Such an intention has been held to arise on a mortgage of farming stock and of the mortgagor's tenant right and interest yet to come and unexpired in the farm and premises, which latter words were held to include the tenant's interest in crops grown in future years of the term, as that which the tenant but for the security would have a right as tenant to collect during the term (*s*).

But it is otherwise in the case of a mortgage of furniture or chattels in a house, with power for the mortgagee on default to enter and take all and every the goods, chattels, effects and premises (*t*), for none of these words point to future property; of course, also, where the security is expressly confined to property then being on the premises (*u*).

28. A different consideration arises where the property though chattel is either absolutely or in a qualified manner fixed to the land.

Whatever is fixed to the land, or to the building which stands upon it, belongs to the land; and though this rule has

(*r*) *Reeve v. Whitmore*, *supra*.

G. 245; 6 Scott, N. R. 967.

(*s*) *Petch v. Tutin*, 15 M. & W. 110.

(*u*) *Stephenson, Exp.*, 12 Jur. 6.

(*t*) *Tapfield v. Hillman*, 6 Man. &

been so far relaxed for the benefit of trade, that as between landlord and tenant certain fixtures may be removed by the tenant during the term, the exception is confined to cases arising out of that relation, and does not apply where the person who annexes the fixtures is the owner of the soil, whether he acquired it by descent or by purchase, and whether he annexed the fixtures for a permanent purpose and for the better enjoyment of the land, or for the purposes of trade or manufacture (*x*).

Therefore, as a general rule, by the mortgage of land or of a mill or other building, not only all fixtures annexed to it at the date of the security (*y*), but also all those which are afterwards annexed by the mortgagor, whether they be or be not such as are removeable as between landlord and tenant (*z*), will vest in the mortgagee though the mortgagor continue in possession, and will not pass to the trustee in bankruptcy of the latter (*a*); and this consequence will follow, independently of any inference as to the non-ownership of the bankrupt arising from the custom of a particular trade that the fixtures shall be furnished by and continue to be the property of the owner of the land (*b*). It is no ground of objection to this rule that the fixtures were erected by a partnership firm, to one member of which the mortgaged property exclusively belonged, the mortgagee not being concerned with the equities between the partners (*c*).

29. The general rule is, however, subject to qualifications arising out of the terms of the security. Where fixtures are specially mentioned as part of the security, they may be so

(*x*) *Fisher v. Dixon*, 12 Cl. & Fin. 312; *Mather v. Fraser*, 2 K. & J. 536; *Cotton, Exp.*, 2 M., D. & De G. 725; *Climie v. Wood*, L. R., 3 Ex. 257; 4 id. 328; *Cullwick v. Swindell*, L. R., 3 Ex. 249.

(*y*) *Place v. Fagg*, 4 M. & R. 277; *Bentley, Exp.*, 2 M., D. & De G. 591, where trade fixtures passed under the word "appurtenances."

(*z*) *Walmsley v. Milne*, 6 Jur., N. S. 125; 7 C. B., N. S. 115; *Reynal, Exp.*,

2 M., D. & De G. 443; *McCluney v. Lemon, Hayes*, 154; *Belcher, Exp.*, 4 D. & C. 703; *Ackroyd v. Mitchell*, 3 L. T., N. S. 236; *Longbottom v. Berry*, L. R., 5 Q. B. 123.

(*a*) *Clark v. Crownshaw*, 3 B. & Ad. 804.

(*b*) See *Rufford v. Bishop*, 5 Russ. 346.

(*c*) *Scarth, Exp.*, 1 M., D. & De G. 240; *Cotton, Exp.*, 2 id. 725; *Cullwick, v. Swindell*, L. R., 3 Eq. 249.

mentioned as to raise an inference that it was confined to those which existed at its date, or such as have been afterwards annexed may be excluded by subsequent dealings between the parties. As if two kinds of property be mortgaged, with the fixtures in one of them, the principle *expressio unius est exclusio alterius* will exclude the fixtures annexed to the other. For instance, a mortgage (*d*) of a foundry and of dwelling-houses, with the bells and other fixtures in the houses, was held to exclude a steam engine and machinery in the foundry, which otherwise would clearly have passed by the mere conveyance of the foundry; but the bare enumeration of specific fixtures in the mortgaged property will not rebut the inference that all fixtures were intended to pass (*e*).

Again, if it be the custom of the place that fixed machinery which can be removed without injury to the freehold should be so removed, and it has been treated between the parties as separate from the land and unaffected by the mortgage, such machinery may be held not to pass (*f*) by a mortgage of the buildings and machinery; but this distinction is admitted with great caution, and was held not to have arisen by a mere mortgage of a factory to one, followed by a separate mortgage of the machinery contained in it to another (*g*).

30. The rule as to the vesting of fixtures in the mortgagee of the buildings or soil to which they are annexed, extends to mortgages of leasehold as well as of real estate (*h*); and the right of the mortgagee to fixtures both existing and added, and whether removeable or not as between landlord and tenant, and whether the property be real or leasehold, arises under an equitable mortgage by deposit (**33**), as well as under a legal mortgage, and whether the deposit be or be not accom-

(*d*) *Hare v. Horton*, 5 B. & Ad. 715.

(*e*) *Mather v. Fraser*, 2 K. & J. 536; and for the effect of words relating to machinery to be added, see *Metropolitan &c. Society v. Brown*, 26 Beav. 454; *Haley v. Hammersley*, 7 Jur., N. S. 765.

(*f*) *Trappes v. Harter*, 2 Cro. & M. 153; and see *Waterfall v. Penistone*, 3

Jur., N. S. 15; 6 El. & Bl. 876.

(*g*) *Whitmore v. Empson*, 23 Beav. 313; 3 Jur., N. S. 230.

(*h*) *Langstaff v. Meagoe*, 2 Ad. & E. 167; *Broadwood, Exp.*, 1 M., D. & De G. 681; *Barclay, Exp.*, 5 De G., M. & G. 403.

panied by a memorandum of agreement (*i*). Where a deposited lease having expired, an agreement was made for a new lease which was not granted, the security was held to remain on the produce of the fixtures (*k*). And the right of the mortgagee of a lessee to sever the mortgaged fixtures from the freehold is a right or interest within the rule laid down by Lord Coke (*l*), as to a surrender of a lease: that "having regard to the parties to the surrender, the estate is absolutely drowned. But having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in law a continuance." The mortgagee may therefore enter and sever the fixtures notwithstanding the surrender of the term (*m*).

31. As to the extent of the term "fixtures" (*n*), whatever is of itself sunk or is built into any fabric which is sunk into the ground, or is fixed by cement, screws, solder or other permanent fastening to any such fabric, or to any part of the building itself, either above or below, and although it may be removed without injury to the building, is considered to be annexed to the land. Such may be a steam engine, steam hammer, engine boiler, cross shafting in a factory, furnace of fire brick and iron, coke oven, still, malt mill, gas fittings, and other fixed machinery (*o*); but a bed plate only laid upon and not fixed to a foundation sunk in the ground, cutters kept in place by wedges, cisterns, and generally such articles as are kept in place by

(*i*) *Price, Exp.*, 2 M., D. & De G. 518; *Barclay, Exp.*, 5 De G., M. & G. 403; *Cowell, Exp.*, 12 Jur. 411; *Broadwood, Exp.*, *supra*; *Tagart, Exp.*, De G. 531; *Heathcoat, Exp.*, Fonbl. N. R. 42; *Edwards, Exp.*, *id.* 208; *Williams v. Evans*, 28 Beav. 239; *Meux v. Jacobs*, L. R., 7 E. & I. App. 481. See *Longbottom v. Berry*, L. R., 5 Q. B. 123.

(*k*) *Fearenside v. Derham*, 13 L. J., N. S., Ch. 354.

(*l*) *Co. Lit.* 378 b.

(*m*) *London and Westminster Loan*

and Discount Company *v. Drake*, 5 Jur., N. S. 1407.

(*n*) As to what securities upon fixtures require registration under the Bills of Sale Act (65).

(*o*) *Mather v. Fraser*, 2 K. & J. 536; *Haley v. Hammersley*, 7 Jur., N. S. 765; *Walmesley v. Milne*, 6 Jur., N. S. 125; 7 C. B., N. S. 115; *Metropolitan &c. Society v. Brown*, 26 Beav. 454; 5 Jur., N. S. 378; *Horn v. Baker*, 9 East, 215; *Ackroyd v. Mitchell*, 3 L. T., N. S. 236.

their own weight only, though resting upon foundations fixed to the soil, do not pass (*p*).

Neither do such articles pass, as, though partly imbedded in the soil, have not been so placed in order to fix them, as for instance straightening plates, which have accidentally penetrated the ground, or sleepers and trams which have become sunk into it by the weight of waggons passing over them (*q*). Nor yet looms, the legs of which are dropped into sockets in the floor of the mill for steadiness only; for besides that they are unfixed and no part of the mill, they are also in the nature of mere furniture, liable to be changed according to the purpose to which the mill and the fixed machinery in it may from time to time be applied (*r*); but it is otherwise if they be nailed down to plugs driven through the pavement (*s*).

32. Moreover, with any fixture will pass (*t*), without special mention, whatever, though accidentally detached from it, or not of its own nature a fixture, may be essential for the proper employment of the machine or fixed article of which it forms part, even though it be more or less capable of use in a detached state. Such may be the stone of a mill removed for the purpose of repair, or the anvil of a steam hammer, and the same rule is applicable in the case of machinery not of a fixed kind; so that such separate adjuncts of a machine as are necessary for its operation or intended to be used as part of it will pass with it, provided they have been actually fitted to their respective positions (*u*).

And a mortgage of a ship at sea with its tackle and appurtenances will pass a chronometer then on board belonging to the owner of the ship (*x*) (245).

(*p*) *Metropolitan &c. Society v. Brown*; *Mather v. Fraser*, *supra*. See *Ashbury, Exp.*, L. R., 4 Ch. 630; and *Longbottom v. Berry*, L. R., 5 Q. B. 123, for other machinery there decided to be fixtures. As to sleepers and rails of railway, *Turner v. Cameron*, L. R., 5 Q. B. 306.

(*q*) *Metropolitan &c. Society v. Brown*, 26 Beav. 454; *Bates v. Duke of Beaufort*, 8 Jur., N. S. 270.

(*r*) *Hutchinson v. Kay*, 23 Beav. 413.

(*s*) *Boyd v. Shorrock*, L. R., 5 Eq. 72; *Holland v. Hodgson*, *id.* 7 C. P. 328.

(*t*) *Place v. Fagg*, 4 M. & R. 277; *Mather v. Fraser*, 2 K. & J. 536; *Fisher v. Dixon*, 12 Cl. & F. 312.

(*u*) *Cort v. Sagar*, 3 H. & N. 370; *Astbury, Exp.*, L. R., 4 Ch. 630.

(*x*) *Langton v. Horton*, 6 Jur. 910.

Of Equitable Mortgages.

33. An equitable mortgage may be made either by a mortgage of the right or equity of redemption of property which is already in mortgage, or by an express or implied contract that certain property, or the evidences of it, shall be liable to a mortgage for the debt. And although formerly such a security could not be set up as a defence to an action of ejectment by the mortgagor (*y*), it was for some purposes recognized by courts of law; which would not permit the assignees of the owner of the estate to recover from his equitable mortgagee the rents which he has received in that character (*z*).

34. With a few exceptions all property of which a legal mortgage can be made (**325**) may also be effectually charged in equity.

There are, however, some kinds of property, such as shipping and shares in railways and other public companies, which under the provisions of public or private statutes, or of the deeds of settlement under which the companies are constituted, can only be transferred in a particular manner, and by prescribed forms of assurance. The exemption (*a*) by statute of public companies from the liability to see to the execution or to take notice of trusts, and the prohibition against the entry on the register or receipt of such notices, has led to some doubt whether equitable mortgages could be made of shares in such companies (*b*). But it has been held (*c*) that the object of the prohibition in the Joint Stock Companies Act, 1856 (which is followed by the Act of 1862), was only to preserve the titles to the shares unincumbered on the books for the convenience of the company, and that the right to make an equitable mortgage of shares, which should be valid against the assignees in bankruptcy of the mortgagor after notice to the

(*y*) *Doe v. Maslin v. Roe*, 5 Esp. 105. But see now the Judicature Act, 1873, s. 24.

(*z*) *Sumpter v. Cooper*, 2 B. & Ad. 223.

(*a*) See the Companies Clauses Act, 1845, s. 20; the Joint Stock Com-

panies Act, 1862, s. 30, following the Act of 1856, s. 19.

(*b*) See *Boulton, Exp., Sketchley, Re*, 1 De G. & J. 163.

(*c*) *Stewart, Exp., Shelley, Re*, 11 Jur., N. S. 25; 34 L. J., Bkey. 6.

company, was not affected. Where the statute or other restraining instrument merely points out the manner in which only a complete legal transfer can be made, an equitable interest may also be created (*d*) by a charge upon or imperfect transfer of the shares or other property, by virtue of which the mortgagor may be compelled to perfect the legal title; the equitable mortgagee being bound, as in other cases of assignments of choses in action, to give the proper notices and to do whatever else is required to complete his title to the property; and being unable to obtain a safe equitable title alone upon shares or stock, the holder of which is possessed only as trustee, unless inquiry have been previously made into the nature of the title (*e*) (1022). If the security be effected by a deposit of blank transfers, the mortgagee may fill up the blanks and complete the registration (*f*).

35. An equitable mortgage may be made—

(1) By a formal mortgage of the equity of redemption of property, the legal estate in which has already been mortgaged; or by an imperfect transfer by deed or writing of the subject of the security or the income thereof: such as—

An agreement or covenant to create a security (*g*);

A conditional surrender of copyhold; or, if a prior mortgagee have been admitted (in which case a surrender would only be evidence of a contract), a release of the equity of redemption (*h*);

An authority to sell and retain the debt out of the proceeds (*i*);

An assignment of rent (*k*);

(*d*) *Pooley, Exp.*, 2 M. D. & De G. 505; *Dobson, Exp.*, id. 685; *Mas-terman, Exp.*, 2 Mont. & A. 209; 4 D. & C. 751. See *Littledale, Exp.*, 6 De G., M. & G. 714, explaining *Lancaster Canal Navigation Company, Exp.*, 1 D. & C. 411; *Boulton, Exp.*, 1 De G. & J. 163.

(*e*) *Shropshire Union, &c. Company v. The Queen, L. R.*, 7 E. & I. App. 496.

(*f*) *Tabiti Cotton Company, Re, L.*

R., 17 Eq. 273.

(*g*) *Sir Simeon Stuart's case*, cit. 3 Ves. 576; 2 Sch. & Lef. 381; *Eyre v. McDowell*, 9 H. L. C. 619; *Jones, Exp.* 4 L. J., N. S., Bkcy. 59; 4 D. & C. 750; *Jebb v. Hodge, L. R.*, 5 C. P. 73. (*h*) 1 Watk. Cop. 148, n.

(*i*) *Hodgson, Exp.*, re *Cook*, 1 Gl. & J. 18.

(*k*) *Wills, Exp.*, 1 Ves. Jr. 162; 2 Cox, 283.

A power of attorney to the creditor to confess judgment in ejectment (*l*); or to receive rents and profits and apply them in payment of interest; or to repay himself out of the surplus proceeds of the sale of an estate in mortgage to the debtor; or to mortgage the debtor's land for payment of the debt (*m*): such a power, when intended to operate as a security, being irrevocable until the discharge of the debt, and giving a right to a judgment for an account, and to the ultimate remedies of equitable mortgagees (*n*).

But an agreement for a preliminary step in the effecting of a security cannot be set up as an equitable mortgage if it have been laid aside unacted upon by the creditor. He must, if any lapse of time have occurred, be able to show that he intended to carry it out, and had taken the necessary steps to render his security effectual. Therefore, a creditor to whom the debtor had given an order for the transfer of shares in a company, which had not been acted upon for three years, and of which no notice had been given to the company, was held not to have any equitable security on the shares, though he had lent money at the date of the order (*o*). And where the advances were made for a longer time than those mentioned in the contract, and in a different manner, it was held that there was no binding security (*p*).

36. (2) By delivery to the creditor or his agent of deeds, copies of court rolls, or other documents of title to property, with intent to create a security thereon (*q*). As to such a security, if the documents were already in the hands of the

(*l*) *Dale v. Smithwick*, 2 Vern. 151.

(*m*) *Spooner v. Sandilands*, 1 Y. & C. C. 390; *Abbott v. Stratten*, 8 J. & L. 603; *Hodgson's case*, 1 Gl. & J. 13; *Parkinson, Re*, 13 L. T., N. S. 26.

(*n*) *Walsh v. Whitcomb*, 2 Esp. 565; *Abbott v. Stratten*, *supra*; *Gaussen v. Morton*, 10 B. & C. 731.

(*o*) *Cumming v. Prescott*, 2 Y. & C. 488.

(*p*) *Barton v. Gray*, L. R., 8 Ch. 982.

(*q*) *Russel v. Russel*, 1 Bro. C. C. 269; *Pye v. Daubuz*, 2 Dick. 759; *Whitbread v. Jordan*, 1 Y. & C. 303. Where the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title deeds. (*Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moo. Ind. App. 308.)

creditor, though it were under an illegal contract, the possession will support a subsequent parol agreement for a lawful security (*r*). And the possession of the agent of the debtor will be sufficient if the intention to make him a trustee for the creditor be shown by the memorandum of deposit (*s*); but the possession of the wife of the debtor will not be sufficient, if the intention to hold the documents for the creditor be shown by parol evidence only (*t*).

37. The equitable mortgage may be valid, although the documents have not been actually deposited (*u*), or even executed (*x*), if a written memorandum of deposit have been given; but cannot be created by a mere parol agreement or order by the debtor to deposit a document with the creditor, if no deposit be made (*y*); nor by a written memorandum of an intention to make a security, not followed by an actual deposit, or by notice of an intention to make the security, communicated to the creditor, while the debtor was lawfully entitled to do so; though the memorandum may create a trust for payment of the debt (*z*).

An equitable mortgage by deposit may be valid if only some or one of the material documents of title to the property have been deposited (*a*), although a complete title be not thereby shown to the depositor's interest in the estate (*b*); and it follows that if part of the material documents of title be deposited with one person, and part with another, each deposittee may have a good security (*c*), unless there be evidence of a contrary intention (*d*).

An equitable mortgage may be created by the deposit of a

(*r*) *James v. Rice*, 5 De G., M. & G. 461.

(*s*) *Lloyd v. Attwood*, 3 De G. & J. 614.

(*t*) *Coming, Exp.*, 9 Ves. 115.

(*u*) *Leathes, Exp.*, 3 D. & C. 112; *Heathcoate, Exp.*, 2 M. D. & De G. 711; *Daw v. Terrell*, 33 Beav. 218.

(*x*) *Orrett, Exp.*, 3 M. & A. 153; and see *Smith, Exp.*, 2 M. D. & De G. 587; *Sheffield Union Banking Company, Re*, 13 L. T., N. S. 477.

(*y*) *Coombe, Exp.*, 4 Mad. 249;

Perry, Exp., 3 M. D. & De G. 252; *Hallifax, Exp.*, 2 M. D. & De G. 544.

(*z*) *Wilson v. Balfour*, 2 Camp. 579. See *Bankhead's Trust, Re*, 2 K. & J. 560.

(*a*) *Arkwright, Exp.*, 3 M. D. & De G. 129; *Lacon v. Allen*, 3 Dr. 579.

(*b*) *Wetherell, Exp.*, 11 Ves. 398; *Roberts v. Croft*, 24 Beav. 223; 2 De G. & J. 1.

(*c*) *Roberts v. Croft*, *supra*.

(*d*) *Pearse, Exp.*, Buck, 525.

receipt for purchase-money, containing the terms of the agreement for sale, if there be no title deeds or conveyance in the depositor's possession (*e*); but not by a deposit of an attested copy of a deed (*f*).

An equitable sub-mortgage of an equitable security may be created without a deposit of the memorandum given with the original security (*g*).

38. An equitable mortgage of land, the title to which is registered under the "Act to facilitate the Title to and Conveyance of Real Estates," cannot be created by a deposit of title deeds (*h*); but a deposit of the land certificate has the same effect for the purpose of creating a lien upon the estate and interest of the depositor, as a deposit of the title deeds of the estate would have had before the passing of the act (*i*).

Under the Land Transfer Act, 1875, subject to any registered estates charges or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title deeds of the land (*k*).

39. The intent to create an equitable mortgage by delivery or deposit of writings may be established by written documents alone, or coupled with parol evidence (*l*), by parol evidence alone (*m*), or by inference arising from the deposit, where the possession of the documents by the holder cannot be otherwise explained (*n*). But an inference that the deposit was made by

(*e*) *Goodwin v. Waghorn*, 4 L. J., N. S., Ch. 172.

(*f*) *Broadbent, Exp.*, 1 M. & A. 635; 4 D. & C. 3; per Sir J. Cross and Sir G. Rose.

(*g*) *Smith, Exp.*, re *Hildyard*, 2 M. D. & De G. 587.

(*h*) 25 & 26 Vict. c. 53, s. 63.

(*i*) *Id.* s. 73.

(*k*) 38 & 39 Vict. c. 87, s. 81.

(*l*) *Casberd v. A. G.*, Dan. 238; 6 Pr.

411; *Ede v. Knowles*, 2 Y. & C. C. 172; *Burgess v. Moxon*, 2 Jur., N. S. 1069.

(*m*) *Russel v. Russel*, 1 Bro. C. C. 269; *Kensington, Exp.*, 2 V. & B. 83; *Haigh, Exp.*, 11 Ves. 403; *Mountfort, Exp.*, 14 Ves. 606.

(*n*) *Featherstone v. Fenwick*; *Harford v. Carpenter*, 1 Bro. C. C. 270, n.; *Edge v. Worthington*, 1 Cox, 211; *Langston, Exp.*, 17 Ves. 227.

way of equitable mortgage will not be admitted in contradiction to a written instrument(*o*); the terms of which, when it exists, will govern the contract, where it is consistent with a security(*p*): nor by reason of the possession by a solicitor of his client's deeds, as against a purchaser who does not inquire into the nature of the possession(*q*): nor when there is no evidence as to the origin of the possession from which a contract may be inferred(*r*).

An intention to create an equitable mortgage may be inferred from a delivery of the documents to be held, or a direction to hold them until the settlement of an account or the execution of a mortgage(*s*), or for the purpose of preparing a legal mortgage for an existing debt(*t*).

Where a document remains in the possession of a debtor, a memorandum annexed to it purporting to appropriate the proceeds to satisfy the debt will not generally of itself create a charge(*u*); but a charge may be created where the document is in the actual keeping of the debtor, if it be in the legal custody of the creditor; as where the debtor properly holds it as his servant(*v*).

(*o*) *Coombe, Exp.*, 17 Ves. 369; *Borroddale, Exp.*, re *Rucker*, 2 M. & A. 398. The possession of the deeds by the mortgagee, under circumstances consistent with a deposit by way of security, raises a sufficient *prima facie* case for the appointment of a receiver on an interlocutory application. (*Bodger v. Bodger*, 11 W. R. 160.)

(*p*) *Shaw v. Foster*, L. R., 5 E. & I. App. 341, per Lord Cairns.

(*q*) *Bozon v. Williams*, 8 Y. & J. 150, per Alexander, C. B. The solicitor may, nevertheless, hold the deeds by his client's appointment as trustee for another person, between whom and a subsequent purchaser to whom they are fraudulently delivered serious questions of priority may arise. See *Lloyd v. Attwood*, 3 De G. & J. 651; 5 Jur., N. S. 1822.

(*r*) *Jones, Exp.*, 3 M. & A. 152, 327; *Jones v. Medlicot*, 6 Pr. 495; *Chapman v. Chapman*, 13 Beav. 308;

15 Jur. 265. Doubted in *Burgess v. Moxon*, in which a memorandum was produced containing a proposal by the debtor that the deeds should be held as security; and held that the burthen was on the debtor to show that the creditor was only a bailee. (2 Jur., N. S. 1059.) But note that in *Chapman v. Chapman* there was no evidence as to the nature of the creditor's possession, and nearly twenty years had elapsed since the date of the bond. See *Dixon v. Muckelston*, L. R., 8 Ch. 155.

(*s*) *Fenwick v. Potts*, 8 De G. M. & G. 506; *Lloyd v. Attwood*, 3 De G. & J. 614; 5 Jur., N. S. 1822.

(*t*) *Edge v. Worthington*, 1 Cox, 211; *Bruce, Exp.*, 1 Rose, 374; *Hockley v. Bantock*, 1 Russ. 144; *Keys v. Williams*, 3 Y. & C. 55.

(*u*) *Adams v. Claxton*, 6 Ves. 226.

(*v*) *Ferris v. Mullins*, 2 Sm. & G. 378; 18 Jur. 718.

40. An equitable mortgage by deposit will affect, *primâ facie*, all the property comprised in the deposited documents, and the interest of the mortgagor therein (*v*); but the agreement (if any), which may be explained by other written evidence, will be the measure of the security (*w*), as well with respect to the particular estates included in the security (*x*), as to the extent to which the interest of the mortgagor therein is intended to be affected (*y*). But the security will not be extended to property not included in the deposited documents, as against prior incumbrancers, merely by reason of a false statement by the mortgagor to the mortgagee that such property is included therein (*z*).

If the memorandum of deposit refer to deeds which are not shown to have been deposited, and other deeds are deposited, the actual deposit will constitute the security (*a*).

An equitable mortgage by deposit will operate to the extent only of the beneficial interest of the mortgagor in the property (*b*), but will include such interests as he may afterwards acquire, either as accretions to or in place of his original interest (*c*), and all incidental rights, such as the goodwill of a business carried on in a mortgaged house (*d*).

41. If an equitable mortgage be not made by deed, the benefit thereof may, by a subsequent express or constructive written or verbal agreement, be extended to persons other than those to whom it was originally made (*e*). And if the security be made to a firm, the members of which are afterwards

(*v*) *Ashton v. Dalton*, 2 Col. 565; *Bisdee, Exp.*, 1 M. D. & De G. 333.

(*w*) *Glyn, Exp.*, 1 M. D. & De G. 29; *Lloyd, Exp.*, 3 D. & C. 765; 1 M. & A. 494; *Hunt, Exp.*, 1 De G. M. & G. 139.

(*x*) *Wylde v. Radford*, 9 Jur., N. S. 1169; *Robinson, Exp.*, 1 D. & C. 119; *Leathes, Exp.*, 3 D. & C. 112; *Heathcoate, Exp.*, 2 M. D. & De G. 711; *Daw v. Terrell*, 33 Beav. 218.

(*y*) *Pryce v. Bury*, 2 Dr. 11; 17 Jur. 1173; 18 id. 967.

(*z*) *Jones v. Williams*, 24 Beav. 47;

3 Jur., N. S. 1066.

(*a*) *Powell, Exp.*, 6 Jur. 490.

(*b*) *Manningford v. Tolman*, 1 Col. 670; *Stackhouse v. Countess Jersey*, 1 J. & H. 721; *Cory v. Eyre*, 1 De G. J. & S. 149; *Wright, Exp.*, 3 M. & A. 49; *Smith, Exp.*, re *Hildyard*, 2 M. D. & De G. 587.

(*c*) *Bisdee, Exp.*, 1 M. D. & De G. 333; *Farley, Exp.*, id. 683.

(*d*) *Chissum v. Dewes*, 5 Russ. 29.

(*e*) *Kensington, Exp.*, 2 V. & B. 79; *Lloyd, Exp.*, 1 Gl. & J. 389; *Alexander, Exp.*, id. 409.

changed, the leaving deposited documents in the custody of each successive firm is constructively a re-deposit with them (*f*). It cannot be shown by parol evidence, that the deposittee of documents holds them as security, both for his own debt and for that of another person (*g*).

42. An equitable mortgage will be a security only for the debt specified in the agreement, and will not by mere inference include debts previously due from the mortgagor to the mortgagee (*h*); but it may include such debts, if an intention that it should do so appear from the circumstances (*i*).

An equitable mortgage by deposit, although accompanied by a written agreement, may, either by written or parol evidence (*k*), and also, as it seems, by inference alone, arising from possession of the deed (*l*), be extended to further advances.

A legal security cannot be extended by such means to subsequent advances made on a parol agreement for a further mortgage; because, it is said, the legal mortgagee holds his mortgage as a contract for conveyance only, and not for deposit (*m*). Parol evidence also is not admissible to show that the person with whom the deeds are deposited holds them for the security of another creditor's debt as well as his own, unless both the mortgagor and the original deposittee have agreed that they shall be so held (*n*); though if the deposittee

(*f*) *Kensington, Exp.*, 2 V. & B. 79; *Oakes, Exp.*, 2 M. D. & De G. 234; *Smith, Exp.*, re Gye, id. 314.

(*g*) *Whitbread, Exp.*, 19 Ves. 209; 1 Rose, 299.

(*h*) *Mountford v. Scott*, T. & R. 274; 3 Mad. 34; *Martin, Exp.*, 2 M. & A. 243; 4 D. & C. 457.

(*i*) *Farley, Exp.*, 1 M. D. & De G. 688; *Smith, Exp.*, re Hildyard, 2 M. D. & De G. 587.

(*k*) *Whitbread, Exp.*, 19 Ves. 209; *Nettlehip, Exp.*, 2 M. D. & De G. 124; *Sanders, Exp.*, 3 L. J., N. S., Bkcy. 92.

(*l*) See *James v. Rice*, Kay, 231; 18 Jur. 374.

(*m*) *Hooper, Exp.*, 1 Mer. 7; and see *Shepherd v. Titley*, 2 Atk. 348; where, however, there was an intervening incumbrance. Thus a person who has obtained a legal mortgage may, as to future advances, be in a worse position than an equitable mortgagee. But the distinction was confessedly made to avoid an extension of the doctrine acted upon in *Langston, Exp.* The result justifies the remark made in another case by Lord Eldon, that "departing from the Statute (of Frauds), we have no rule to go by."

(*n*) *Crossfield, Exp.*, 3 Ir. Eq. Rep. 67.

himself be no creditor but a trustee only, he may be shown to hold them for another's benefit (*o*).

43. In order to connect a debt of long standing with the possession of the debtor's deeds, the creditor must proceed upon a distinct allegation, supported by proper evidence, that they were delivered to him by way of security (*p*). Nor, if the plaintiff's evidence of the deposit be defective at the hearing, will he be entitled to an inquiry to enable him to establish his security; because a reference will not then be directed upon a matter which involves the very root of the plaintiff's title (*q*). The rule in bankruptcy also requires that evidence be given of the intention to effect a security by the deposit. The usual order for sale in cases of equitable mortgage has been refused (*r*) after the lapse of twelve years from the date of the deposit, there being no memorandum, and the bankrupt being dead. But an inquiry will sometimes be directed in bankruptcy as to the circumstances attending a deposit of doubtful effect (*s*).

44. An equitable mortgage or sub-mortgage of property which is within the rules of law concerning property in the order and disposition of a bankrupt, will be valid as against the trustee in bankruptcy of the mortgagor only when the mortgagor has given such notices and done such other acts as are necessary in like cases to perfect the title of a legal mortgagee (*t*) (887); but as between the contracting parties the equitable mortgage will be valid, although such acts be omitted (*u*).

An equitable mortgage of shares in a joint stock company will be valid after notice thereof to the company, as against the trustee in bankruptcy of the mortgagor, notwithstanding the statutory provision forbidding the entry upon the register, and

(*o*) *Whitbread, Exp.*, 19 Ves. 209.

(*p*) *Chapman v. Chapman*, 13 Beav. 308; 15 Jur. 265.

(*q*) *Holden v. Hearn*, 1 Beav. 456; *Kebell v. Philpot*, 7 L. J., N. S., Ch. 237.

(*r*) *Jones, Exp.*, 3 M. & A. 152, 327.

(*s*) *Clouten, Exp.*, 7 Jur. 135.

(*t*) *Spencer, Exp.*, 1 Dea. 468; 3 M. & A. 697; *Vallance, Exp.*, 2 Dea. 354; *Arkwright, Exp.*, 3 M. D. & De G. 129; *Wood, Exp.*, id. 315; *Boulton, Exp.*, 1 De G. & J. 163.

(*u*) *Cook v. Black*, 1 Hare, 390.

the receipt by the company of notice of any express, implied or constructive trust (*x*).

Of the Registration of Mortgage Securities.

45. By the Registry Acts for Middlesex, the three Ridings of York, Kingston-upon-Hull, and Ireland (*y*), a memorial of all deeds and conveyances, and of all wills and devises in writing, concerning and whereby any hereditaments may be any way affected in law or equity, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*z*), unless such memorial thereof be registered according to the acts; in the case of a deed or conveyance, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, and, in the case of a will, at the time and in the manner by the acts directed (49).

The acts provide for the registration of the memorials, and (except in the case of the North Riding act) for the filing of every memorial in order of time as the same shall be brought to the office, and for the entry or registration of the memorials in the order in which they come to the hands of the registrar. The Irish act contains (*a*) the further important provision, that every deed or conveyance, a memorial whereof shall be duly registered, shall be good and effectual, both at law and in equity, according to the priority of time of registering the memorial and according to the right and interest of the persons conveying (1066).

The acts do not extend (*b*) to any copyhold estates, or to any leases at rack rent, or for a term not exceeding twenty-one years, where the actual possession and occupation go with the

(*x*) *Stewart, Exp.*, 84 L. J., Bkcy. 6; 11 Jur., N. S. 25, on construction of 19 & 20 Vict. c. 47, s. 19; re-enacted by 25 & 26 Vict. c. 89, s. 80 ("The Companies Act, 1862").

(*y*) Middlesex, 7 Anne, c. 20; West Riding, 2 & 3 Anne, c. 4, 5 Anne, c. 18; East Riding and Kingston-upon-Hull, 6 Anne, c. 85; North Riding, 8 Geo. 2, c. 6; Ireland, 6 Anne, c. 2;

further regulated by 2 & 3 W. 4, c. 87, and 27 & 28 Vict. c. 76. •

(*z*) And also against creditors by judgment, recognizance or statute. (Irish act, s. 4.)

(*a*) Sect. 4.

(*b*) The exception is not in the West Riding act. The Irish act confines it to leases for twenty-one years with actual possession. (Sect. 14.)

lease, or to any of the chambers in Serjeants' Inn, or the Inns of Court or Chancery, in Middlesex. It is, however, considered advisable, though not clearly necessary, to register leases of copyholds where leases of freeholds would be registered, the lease being a common law interest (c).

Although Serjeants' Inn is within the city of London, it is considered that the exception of it from the operation of the act was an error, and does not imply that assurances of property within the city must generally be registered; and this understanding is commonly acted upon in practice (d).

46. It was intimated (e), in a case which arose under the Irish Registry Act, that the exception in favour of leases not exceeding twenty-one years, where the actual possession goes with the lease, does not apply to a mere case of legal possession by receipt of the rents, but to such a possession only as is accompanied by occupation; because the object of the act being to guard against secret conveyances, a visible occupation is not within the mischief, but is a substitute for registration; whereas legal possession only may be entirely unknown. In the English acts the expression is, "where the actual possession *and occupation* go along with the lease." And when, by means of a mortgage, the possession and occupation are divided, it is proper to register the assignment of a beneficial lease; but not where the transaction is merely an assignment for valuable consideration, for then the possession and occupation still go with the lease (f). With respect to a doubt which has been raised (g), whether a lease originally at rack rent, but which by improvements or otherwise has since become valuable, be within the exception of the act, it has been argued with force, that it ought to remain so (h), because it ought not to be affected by matter *ex post facto*, or to vary with the value of property.

(c) Sugd. V. & P. 980, ed. 11; 732, ed. 14.

(d) Ibid.

(e) *Fury v. Smith*, 1 Huds. & Bro. 735.

(f) Sugd. V. & P. 980, ed. 11; 732,

ed. 14; and Rigge on Registry, 88, note (o).

(g) Rigge on Registry, 88, note (n).

(h) Sugd. V. & P. 980, ed. 11; 732, ed. 14.

47. The necessity for registration does not of course arise in the case of a mere equitable mortgage by deposit, without memorandum, there being no instrument which can be registered (*i*). But the word "conveyance," and other expressions in the acts, are now held to refer to equitable as well as legal incumbrances, and to instruments not under seal, as well as to deeds: and a direction to prior mortgagees to hold the title deeds, subject to their own security, for the benefit of subsequent mortgagees, a memorandum of further charge, or other form of agreement for a mortgage, requires registration, as a document within the mischief of the acts (*k*). An assignment of a sum of money charged upon land has been held not to require registration (*l*); and it appears to be only by a somewhat strained construction of the acts that such an interest can be included in them. The decision, however, has been doubted, and it is said that in Ireland it is not relied upon in practice (*m*) (957).

48. By the act to facilitate the proof of title to and the conveyance of real estates, otherwise known as the Land Registry Act, 1862 (*n*), but under which registrations ceased from the 1st January, 1876 (*o*), it was provided, that the registrar should enter in "the Register of Mortgages and Incumbrances" an account of all the charges and incumbrances affecting registered lands or any part thereof, or the estate or interest therein of any person named in the record of title, a copy of which was to be contained in the land certificate delivered to the owner of any estate or interest in the lands; and that a certificate should be granted to any person who should appear by the register of incumbrances to be entitled to any mortgage charge or incumbrance on registered lands, which certificate should contain a description of the lands and the particulars of the incumbrance.

(*i*) *Sumpter v. Cooper*, 2 B. & Ad. Ch. 8.
223.

(*k*) *Moore v. Culverhouse*, 27 Beav. 639. *Notwithstanding Wright v. Stanfield*, 27 Beav. 8; *Neve v. Pennell*, 2 H. & M. 170; 83 L. J., Ch. 19; *Wight's Mortgage Trust, Re*, L. R., 16 Eq. 41; *Credland v. Potter*, 18 id. 350; 10

(*l*) *Malcolm v. Charlesworth*, 1 Keen, 68.

(*m*) *Davids. Conr.* 2; 770, ed. 3.

(*n*) 25 & 26 Vict. c. 53, ss. 14, 68.

(*o*) *Land Transfer Act*, 1875, c. 87, ss. 3, 125.

A purchaser of property registered with an indefeasible title from a first registered mortgagee is entitled under this act to be registered with an indefeasible title, the right of the subsequent registered mortgagees of the original mortgagor being only against the surplus purchase-money (*p*); and a purchaser of registered property under a power of sale in a mortgage after registration of his conveyance is entitled under s. 34 of this act to have it removed from the register without the consent of the late owner of the equity of redemption, although the original registration only related to the mortgagor's title, subject to the mortgage, and although the power of sale might have been improperly exercised (*q*).

49. The Land Transfer Act, 1875, exempts land registered under it, from and after the date of registration, from the jurisdiction of the local registries for Middlesex, the West, North and East Ridings of Yorkshire, and the town and county of Kingston-upon-Hull; and no document relating to any such registered land executed, and no testamentary instrument relating to any such registered land coming into operation, subsequently to such date as last aforesaid, shall be required to be registered in any of the said local registries (*r*).

50. The act, after establishing a land registry and providing for the registration of landowners either with absolute or possessory titles, provides, as to incumbrances, that every registered proprietor of any freehold or leasehold land may in the prescribed manner charge such land with the payment at an appointed time of any principal sum of money either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made, as the proprietor of such charge, and the particulars of the charge and of the power of sale, if any; and the registrar shall, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form (*s*).

(*p*) Richardson, Re, L. R., 12 Eq.
398; 13 id. 142.

(*r*) 38 & 39 Vict. c. 87, s. 127.

(*s*) Id. s. 22; Rules 20, 38, Decem-

(*q*) Winter, Re, L. R., 15 Eq. 156.

ber, 1875.

51. Where a registered charge is created on any land, there shall be implied on the part of the then registered proprietor of the land, his heirs, executors and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge (**52**) to pay the principal and interest, if any, at the appointed time and rate; and, if the principal or any part thereof be unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal as for the time being remains unpaid (*t*). (**1551.**)

And where the registered charge is created on leasehold land, there shall be implied on the part of the then registered proprietor of the land, his heirs, executors and administrators, unless there be a negative entry on the registry, a covenant with the registered proprietor for the time being of the charge, that the registered proprietor of the land at the time of the creation of the charge, his executors, administrators and assigns, will pay, perform and observe the rents, covenants and conditions of the original lease, and will keep the proprietor of the charge, his heirs, executors and administrators, indemnified against all actions, suits, expenses and claims on account of the nonpayment of the rent, or any part thereof, or the breach of the said covenants and conditions, or any of them (*u*). (**715, 821, 835, 1075, 1718.**)

52. The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred; the registrar shall also, if required, deliver to the transferee a fresh certificate of charge; but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof (*x*).

53. If any certificate of charge is lost, mislaid or destroyed, the registrar, upon being satisfied of the fact, may grant a new

(*t*) Id. s. 23; Rule 20, December, 1875.

1875.

(*u*) Id. s. 40; Rule 21, December,

(*u*) Id. s. 24; Rule 20, December, 1875.

certificate of charge in the place of the former one; and upon the delivery up to him of a certificate of charge may grant a new one in its place.

Any certificate of charge shall be *primâ facie* evidence of the several matters therein contained (*y*).

54. The executor or administrator of the sole registered proprietor, or of the survivor of several joint registered proprietors, and the trustee in the bankruptcy of the bankrupt registered proprietor of any charge, shall be entitled to be registered as the proprietor in the place of the former owner thereof (*z*).

The husband of any female registered proprietor of a charge may apply to be registered as proprietor in her place (*a*).

Any person registered in the place of a deceased or bankrupt proprietor shall hold the charge, in respect of which he is registered, upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests or equities, subject to which the deceased or bankrupt proprietor held the same; but save as aforesaid he shall, in all respects and in particular as respects any registered dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for a valuable consideration (*b*).

The fact of any person having become entitled to any charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved to the satisfaction of the registrar (*c*).

55. The registered proprietor alone can charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests and equities in the same manner as if the estate were not registered, and any person entitled to or interested in

(*y*) 38 & 39 Vict. c. 87, ss. 78—80;
Rule 35, December, 1875.

(*z*) Id. ss. 42, 43.

(*a*) Id. s. 45.

(*b*) Id. s. 46.

(*c*) Id. s. 47, Rule 25.

any unregistered estates, rights, interests or equities in registered land, may protect the same from being impaired by any act of the registered proprietor, by entering on the register such notices, cautions, inhibitions or other restrictions as are mentioned in the act.

The registered proprietor alone can transfer a registered charge by a registered disposition; but, subject to the maintenance of his right, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land (*d*).

56. No notice of any trust, implied, express or constructive, shall be entered on the register or be receivable by the registrar; no person shall be registered as proprietor of any undivided share in any charge; and a number of persons exceeding the number of four shall not be registered as proprietors of the same charge; and if the number of persons showing title exceeds such prescribed number, such of them, not exceeding the prescribed number, as may be agreed upon, or as the registrar may in case of difference decide, shall be registered as proprietors; and upon the registry of two or more persons as proprietors of the same charge, an entry may, with their consent, be made on the register to the effect that, when the number of such proprietors is reduced below a certain specified number, no registered disposition of such charge shall be made, except under the order of the court (*e*).

57. Subject to the provisions of the act, with respect to registered dispositions for valuable consideration, any disposition of land, or of a charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner (*f*).

58. The enactments which required (*g*) the enrolment of grants of annuities, or rent charges for life or lives or term of

(*d*) Id. s. 49.

(*f*) Id. s. 98.

(*e*) Id. s. 88 (1), (2), (3), Rule 37.

(*g*) 53 Geo. 3, c. 141.

years, or greater estate determinable on life or lives, having been repealed (*h*), it has been provided (*i*) that any annuity or rent charge granted after the passing of the act, otherwise than by marriage settlement (*j*), for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name, place of abode, and title, trade or profession of the person whose estate is intended to be affected thereby, and the date of the instrument by which the annuity is granted, and the annual sum or sums to be paid, be left with the Senior Master of the Common Pleas at Westminster for registration according to the act. By another section (*k*) it is provided that the act shall not extend to require the registry of annuities or rent charges given by will.

59. The Bills of Sale Act, 1854 (*l*), after reciting that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors, provides that every bill of sale of personal chattels made after the 10th day of July, 1854, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an

(*h*) 17 & 18 Vict. c. 90.

(*k*) Sect. 14.

(*i*) 18 & 19 Vict. c. 15, s. 12, 1855.

(*l*) 17 & 18 Vict. c. 36, preamble and sect. 1.

(*j*) The words "other than by marriage settlement" are parenthetical.

affidavit (*m*) of the time of such bill of sale being made or given, and a description of the residence and occupation of the maker or giver thereof, or, in case the same shall be made or given by any person under or in execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed (67) with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale (as a warrant of attorney in a personal action given by a trader is by law required to be filed), *otherwise* such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of Law or Equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which, at or after the time of such bankruptcy, filing the petition in insolvency, execution by the debtor of the creditor's deed, or execution of such process (as the case may be), and after the expiration of the said period of twenty-one days shall be in the possession or apparent possession of the maker of the bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be.

60. To create a necessity for registration, there must, there-

(*m*) I. e., the bill of sale and the affidavit are to be filed simultaneously.
Grindell v. Brendon, 5 Jur., N. S. 1420.

See Mason v. Wood, L. R., 1 C. P. D. 63.

fore, be an apparent possession by the maker of the bill of sale, and non-registration for twenty-one days after it is made. So that if, within twenty-one days after the making, the assignee takes and retains possession, he acquires a good title and no registration is necessary (*n*). And if within the twenty-one days he obtains a substituted bill of sale, which is registered in due time, it will be available where there is no question of fraud or bankruptcy (*o*); but the successive renewals of bills of sale within the twenty-one days without registration is held to be a fraudulent evasion of the act, if the object be to defeat and delay the creditors of the grantor (*p*). If the debtor have no other property, it will be an act of bankruptcy (*q*), and after an act of bankruptcy will not be protected as a *bonâ fide* contract (*r*). An imperfect registration does not place the assignee in a worse position than if there were none (*s*). If the registration be perfected, the act does not regard the completion of the transaction in other respects (*t*): and it is no objection that the bill of sale was registered as of the day of its execution, though the consideration was not paid, nor the deed attested, till after the day of the actual execution.

The registration of the bill of sale is necessary for its validity only as against the persons mentioned in the first section of the act, and not against the liquidator of a company, or against the holder of a subsequent bill of sale, who, moreover, cannot oust the holder of an earlier registered bill by taking possession. But an execution displaces an unregistered bill of sale entirely, and not merely as concerns the execution creditor (*u*).

61. The description of the residence and occupation required

(*n*) *Marples v. Hartley*, 7 Jur., N. S. 446; *Hollingsworth v. White*, 6 L. T., N. S. 604; *Harris, Exp.*, L. R., 8 Ch. 48.

(*o*) *Smale v. Burr*, L. R., 8 C. P. 64; *Ramsden v. Lupton*, L. R., 9 Q. B. 17.

(*p*) *Cohen, Exp.*, L. R., 7 Ch. 20.

(*q*) *Stevens, Exp.*, L. R., 20 Eq. 786.

(*r*) *Stansfeld v. Cubitt*, 2 De G. & J. 222; under the Bankruptcy Act of

1849, s. 133. See Bankruptcy Act, 1869, s. 95.

(*s*) *Banbury v. White*, 9 Jur., N. S. 913; 2 H. & C. 300; but it does not appear by the report that the assignee had taken possession.

(*t*) *Darvill v. Terry*, 6 H. & N. 807.

(*u*) *Richards v. James*, L. R., 2 Q. B. 285; *Marine Mansions Co., Re*, L. R., 4 Eq. 601; *Meux v. Jacobs*, L. R., 7 E. & L. App. 481; *Allen, Exp.*, L. R., 11 Eq. 209.

by the statute must set forth the residence and occupation at the time of the making of the bill of sale and not at the time of filing the affidavit (*v*). Both in the case of the maker of the bill and of the attesting witness, the place of employment will sufficiently indicate the place of residence (*x*); and the description of the witness in his description as deponent will be sufficient (*y*). If the residence be described with convenient certainty, the registration will not be vitiated by an addition which, though erroneous, is not calculated to mislead (*z*); and the copy of the bill of sale annexed to the affidavit may be used to supplement an imperfect description in the affidavit of the maker of the bill of sale (*a*).

As to the occupation, though a person who has none may well be described as a gentleman (*b*), the description of gentleman or esquire is improper for one who has distinct occupation, and even it seems for an attorney, though his proper legal description is that of gentleman (*c*). The description of government clerk is sufficient without indicating the particular office in which he is employed, and "insurance clerk" has been considered to be sufficient for a clerk in an insurance office (*d*). The occupation and residence must also be set forth in the affidavit, and will not be sufficiently described by reference to the bill of sale (*e*); but it will be sufficient if the deponent describe it "to the best of his belief" (*f*).

The clause which requires a statement of the residence and occupation of the attesting witness applies to every bill of sale

(*v*) *London and Western Loan Co. v. Chase*, 9 Jur., N. S. 412; 12 C. B., N. S. 730.

(*x*) *Blackwell v. England*, 3 Jur., N. S. 1302; 27 L. J., Q. B. 124; *Attenborough v. Thompson*, 2 H. & N. 559.

(*y*) *Nicholson v. Cooper*, 27 L. J., Exch. 398; *Stadden v. Sergeant*, 1 F. & F. 322.

(*z*) *Hewer v. Cox*, 6 Jur., N. S. 1339.

(*a*) *Jones v. Harris*, L. R., 7 Q. B. 157.

(*b*) *Morewood v. South Yorkshire Railway Co.*, 3 H. & N. 798; *Gray v. Jones*, 14 C. B., N. S. 743; *Smith v. Cheese*, L. R., 1 C. P. D. 60.

(*c*) *Tuton v. Sanoner*, 3 H. & N. 280;

Allen v. Thompson, 1 H. & N. 15; *Beales v. Tennant*, 6 Jur., N. S. 628; *Adams v. Graham*, 10 Jur., N. S. 356; *Brodrick v. Scale*, L. R., 6 C. P. 98; *Hooman, Exp.*, L. R., 10 Eq. 68. See *Larchin v. North Western Deposit Bank*, L. R., 10 Exch. 64.

(*d*) *Grant v. Shaw*, L. R., 7 Q. B. 700.

(*e*) *Pickard v. Bretz*, 5 H. & N. 9; *Hatton v. English*, 7 C. & B. 94; reported as *Walton v. English*, 3 Jur., N. S. 294; but see *Banbury v. White*, 9 Jur., N. S. 913; *Foulger v. Taylor*, 5 H. & N. 202.

(*f*) *Roe v. Bradshaw*, L. R., 1 Exch. 106.

included in the act, whether it be or be not made under or in execution of any process (*g*).

It has been held sufficient to file a copy of the schedule with the original bill of sale where the original schedule had been disannexed and lost (*h*).

The affidavit must be made by the attesting witness, but it need not state that the deponent was the witness; it being sufficient (*i*) if, on the face of the bill and affidavit, it is obvious that the deponent and the attesting witness were the same person.

62. If such bill of sale shall be made or given (*k*) subject to any defeasance or condition, or declaration of trust (*i.e.*, a declaration of trust in which the grantor is interested, a provision in favour of the grantee being of no importance to creditors (*l*)), not contained in the body thereof, such defeasance, condition or declaration of trust shall for the purposes of the act be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same, or a copy thereof respectively, shall be filed; *otherwise* such bill of sale shall be null and void to all intents and purposes as against the same persons, and as regards the same property and effects, as if such bill of sale, or a copy thereof, had not been filed according to the provisions of the act. A bill of sale with a merely verbal condition made before its execution, but not noticed in it, will therefore be void (*m*).

63. In the construction of this act (*n*) the term *bill of sale* includes bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal

(*g*) *Tuton v. Sanoner*, 4 Jur., N. S. 365.

(*h*) *Green v. Attenborough*, 3 H. & C. 468; 11 Jur., N. S. 14.

(*i*) *Routh v. Roublet*, 28 L. J., Q. B. 240. Directors of a company who sign the bill of sale for the purpose of authenticating the seal are not considered to be attesting witnesses within the act,

(*Shears v. Jacob*, L. R., 1 C. P. 513; *Deffell v. White*, 2 id. 144.)

(*k*) Sect. 2, Bills of Sale Act, 1854.

(*l*) *Robinson v. Collingwood*, 10 Jur., N. S. 1080; 34 L. J., C. P. 18. See *Collins, Exp.*, L. R. 10 Ch. 367.

(*m*) *Southam, Exp.*, L. R., 17 Eq. 578.

(*n*) Sect. 7.

chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt; *but not* assignments for the benefit of the creditors of the maker or giver of the bill of sale, marriage settlements, transfers or assignments of any ship or vessel, or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts, or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented.

64. Agreements to execute a transfer and other equitable assurances require registration as bills of sale (*o*). Assignments for the benefit of creditors may fall within the exception, though not appearing on the face of them to be executed by all the creditors (*p*), provided they do not exclude any; a post-nuptial settlement not made in pursuance of an ante-nuptial agreement, and therefore not being within the marriage consideration, must be registered (*q*). The bill of sale, whatever its form, must be an instrument by which a title to the goods is acquired; and the term therefore does not include such a document as a receipt for purchase-money, though it refers to an inventory of the goods (*r*), and though the real consideration was a past debt and no money was paid (*s*).

65. The expression *personal chattels* means goods, furniture,

(*o*) Mackay, Exp., L. R., 8 Ch. 643; Conning, Exp., L. R., 16 Eq. 414, notwithstanding observation of Bacon, C. J. B., in Homan, Exp., 12 Eq. 598. For an instance of an hypothecation held to fall within the exceptions in s. 7, see N. W. Bank, Exp., L. R., 15 Eq. 69.

(*p*) General Furnishing Co. v. Venn, 9 Jur., N. S. 550; 2 H. & C. 153.

(*q*) Fowler v. Foster, 5 Jur., N. S. 99; Ashton v. Blackshaw, L. R., 9 Eq. 510.

(*r*) Allsop v. Day, 8 Jur., N. S. 41; Thomson v. Barrett, 1 L. T., N. S., Q. B. 268; Hale v. Met. Saloon Omnibus Co., 28 L. J., Ch. 777.

(*s*) Byerley v. Prevost, L. R., 6 C. P. 144.

fixtures and other articles capable of complete transfer by delivery. But the expression only includes fixtures for the particular purposes of the act (*t*). It is not necessary (*u*) to register a conveyance of or contract concerning land, by the mere force of which a legal or equitable interest passes in fixtures or other chattels, as adjuncts to the land, and which the mortgagee is not empowered to sever from it. But fixtures which are only such for the purposes of trade, and not as permanent adjuncts to the land, and the property in which is distinct from their connection with and adhesion to the freehold, or which the mortgagee by his security has power to sever and to sell separately, are within the act when separately assigned, and are not exempt because the land may be charged by the same instrument (*x*).

The term *personal chattels* does not include chattel interests in real estate, nor shares or interests in the stocks, funds or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale.

And personal chattels are deemed to be in the *apparent possession* of the maker or giver of the bill of sale, so long as they shall remain or be in or upon any premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession may have been taken by or given to any other person; that is to say, if nothing has been done beyond the taking of formal possession. The question as to the nature of the possession is generally one of fact, and the act will be construed with reference to the circumstance that, being for the prevention of fraud, it

(*t*) *Meux v. Jacobs*, L. R., 7 E. & I. App. 481.

(*u*) *Mather v. Fraser*, 2 K. & J. 536;
Brown v. Bateman, L. R., 2 C. P. 272;
Barclay, Exp., L. R., 9 Ch. 576.

(*x*) *Waterfall v. Penistone*, 3 Jur.,

N. S. 15; 6 El. & Bl. 876 (see *Hellawell v. Eastwood*, 6 Exch. 295); *Begbie v. Fenwick*, L. R., 8 Ch. 1075, n.; *Dagliash, Exp.*, id. 1072; *Hawtry v. Butlin*, L. R., 8 Q. B. 290, notwithstanding *Boyd v. Shorrocks*, L. R., 5 Eq. 72.

has a tendency to invalidate *bond fide* contracts (y). But the occupation of the premises by the maker of the bill of sale is an actual *de facto* occupation, and not a mere tenancy (z).

A corresponding statute (a) to the act of 1854 was passed for Ireland, but neither of the acts extend to Scotland (b).

66. It is understood that, to avoid the necessity of registration under the Bills of Sale Act, a practice has arisen of making securities upon chattels by assignment or demise of the interest of the debtor in the premises in which the chattels are placed, with a proviso that the premises shall be held by the debtor as tenant from year to year at a rent which, together with the tenancy itself, is to cease upon payment of all monies recoverable under the security; a power of entry without previous demand being also reserved upon default in payment. And it has been held by several learned County Court judges that such a security is not fraudulent either under the Statute of Elizabeth (326), the law of bankruptcy (328), or the Bills of Sale Act.

It seems clear that the Statute of Elizabeth does not apply. As to the law of bankruptcy, the only question seems to be, whether the creditor, as the holder of an interest in the tenement which contains the chattels, at a rent which may be ten times its value, under a fictitious tenancy created only for the purposes of the security, is in the position of a landlord to whom, under sect. 34 of the Bankruptcy Act, 1869, the right of distress upon the bankrupt's chattels for a year's rent is given.

It is submitted that the validity of such a security as against the persons against whom unregistered securities upon personal chattels are void, under the Bills of Sale Act, is also doubtful. A bill of sale includes an authority or licence to take possession of personal chattels as security for a debt; and it is described, for the purposes of the act, as an instrument whereby the grantee or holder has power, either with or without notice, and either

(y) *Gough v. Everard*, 2 H. & C. 1. L. R., 9 Ch. 697.

See *Homan, Exp.*, L. R., 12 Eq. 598, explained in *Harding, Exp.*, 15 id. 223; *Mutton, Exp.*, L. R., 14 Eq. 178; *Lewis, Exp.*, L. R., 6 Ch. 626; *Emmanuel v. Bridges*, L. R., 9 Q. B. 286; *Jay, Exp.*, L. R., 6 Exch. 1.

(z) *Robinson v. Briggs*, L. R., 6 Exch. 1.

(a) 17 & 18 Vict. c. 55.

(b) *Coote v. Jecks*, 18 Eq. 597.

immediately or at any future time, to seize and take possession of any property and effects comprised in and made subject to it. In the case of *Morton v. Woods* (c), which was chiefly relied upon in the decisions referred to, the security consisted of a conveyance of real estate in the debtor's possession, with an attornment to the creditors for ten years, if the security should so long continue; with power for them to enter and determine the term. The deed was not executed by the creditors, and the question chiefly discussed related to the nature of the interest which they had acquired. The Chief Baron in his judgment said, that if this security was a bill of sale, every mortgage which included chattels, with a power ultimately to take possession or distrain, would then be within the act; but that no such doctrine could be supported: adding, according to the report in the "Law Journal," that *if the question had arisen*, the court would hold that the deed was not an evasion of the act, and was not a bill of sale requiring registration. This part of the learned judge's observations seems therefore to have been of an extra-judicial character; and it is submitted that, having regard to the definition in the act of a bill of sale (63), and to the description of its effect in the first section of the act, and to the recital in the preamble (59), the kind of security under consideration is within the mischief aimed at by the act; and that a distinction may and ought to be made between a mortgage which creates a tenancy as an adjunct to the security, and to enable the creditor to recover the profits of the mortgaged estate, and a transaction in which the power of distress forms the only real security, and is used for the purpose of enabling the creditor to lay hold of chattels, upon the credit of the apparent possession of which the debtor is in the meantime enabled to contract other liabilities.

67. The Bills of Sale Act, 1866 (d), provides that the registration (which is the same as the filing mentioned in the original act) is, during the subsistence of the security, to be

(c) L. R., 4 Q. B. 307; 38 L. J., Q. B. 81.

(d) 29 & 30 Vict. c. 96, s. 4. The time appears to run from the original

registration, but it is understood that in the office, each period of five years has been considered to run from the date of the last registration.

renewed once in every five years, commencing from the day of registration; and, if not so renewed, is to cease to be of any effect at the expiration of any period of five years during which a renewal has not been made; but where five years from the original registration of a bill of sale under the principal act had expired before the 1st January, 1867, such bill of sale was to be as valid as it would have been if the later act had not passed, if the registration were renewed before the 1st January, 1867.

The registration is renewed by filing, in the office of the Masters of the Queen's Bench, an affidavit stating the date of the bill of sale and the names, residences and occupations of the respective parties thereto, as stated therein, and the date of the registration of the bill of sale, and that it is still a subsisting security, and such Masters shall thereupon number the affidavit and renumber the original bill of sale or copy filed in the office with a similar number (*e*). The duties of the registering officer are ministerial only (*f*).

68. The several forms of assignment and species of property, declared by sect. 7 of the act of 1854 not to be within the meaning of the act, had been already declared by various decisions at law and in equity not to be within the mischief of the statute 13 Eliz. c. 5 (327); under which the apparent possession of chattels after assignment had been held, some years after the passing of the act, to be under the circumstances fraudulent. The act, therefore, appears simply to make registration necessary in cases which were already within the statute of Elizabeth and the authority of *Twyne's case* (*g*) (22). Nor does it affect bills of sale of property of which possession is delivered; but only of such as remains in the possession of the maker of the bill. Before the statute the question in ascertaining the validity of the bill of sale was, whether the transaction were *bonâ fide* or made with an intention to defeat the creditors of the assignor, and apparent possession of itself raised a presumption of fraud, the existence of which might be determined by a jury; but this not being (as appears by the

(*e*) Sect. 5.

346.

(*f*) *Needham v. Johnson*, 15 W. R.

(*g*) 8 Co. 80.

preamble of the statute) a sufficient safeguard, the registration of the bill of sale was provided as a further security to the creditor, but not for giving additional validity to the instrument. The doctrine of reputed ownership arising out of the apparent possession of the debtor is therefore not affected by the act (*h*).

Of Mortgages of Ships.

69. Mortgages of British ships (*i*) have been long subject to statutory regulation.

The Merchant Shipping Act, 1854, by which the acts relating to merchant shipping are amended and consolidated (the several acts and parts of acts mentioned in the schedule to the Merchant Shipping Repeal Act, 1854 (*j*), including the act of 8 & 9 Vict. c. 89, having been thereby repealed), provides (*k*) that a registered ship, or any share therein, may be made a security for a loan or other valuable consideration, and requires that the instrument creating the security (called a mortgage) shall be in the form mentioned in the schedule, or as near thereto as circumstances will permit, and, on the production of such instrument, the registrar of the port at which the ship is registered is to record the same in the register book (*l*), in the order of time in which it is produced to him for that purpose, and is, by a memorandum under his hand, to notify on the mortgage that the same has been recorded, stating the date and hour of the record.

An entry is also to be made (*m*) in the register book, on production of an instrument of transfer, of the name of every transferee, as mortgagee of a ship, or shares therein, with a like memorandum of the fact, and of the date and hour of the

(*h*) Per Turner, L. J., *Stansfield v. Cubitt*, 2 De G. & J. 222; *Badger v. Shaw*, 6 Jur. N. S. 377.

(*i*) A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships. Per Turner, L. J., *Hooper v. Gumm*, L. R., 2 Ch. 290.

(*j*) 17 & 18 Vict. c. 120.

(*k*) 17 & 18 Vict. c. 104, ss. 66, 67.

(*l*) A slight difference between the mortgage and the register, in the name of the ship, is of no consequence if there is no doubt as to identity; as where the mortgage was of the "City of Bruxelles," registered as the "City of Brussels." (*Bell v. Bank of London*, 3 H. & N. 780.)

(*m*) Sect. 73.

record, on the instrument of transfer, which instrument is also to be in the form specified in the schedule.

70. The transmission (*n*), in consequence of death, bankruptcy or insolvency, or the marriage of a female mortgagee, or by any lawful means, other than by a transfer under the act, of the interest of a mortgagee, is to be authenticated by declaration, and evidenced according to the act; upon receipt and production of which declaration and evidence, the registrar is to enter the names of the persons entitled in the register book as mortgagees of the ship, or share, in respect of which the transmission has taken place (*o*).

71. Where a registered owner is desirous of selling or mortgaging at any place out of the country or possession in which the port of registry is situate, the registrar may grant certificates (*p*), giving powers of mortgage or sale, previous to the granting of which must be entered in the register book (*q*) the names of the persons by whom the power is to be exercised; and in case of mortgage, the maximum amount of charge to be created, the time within which the power may be exercised, and the place (if any be limited) where it is to be exercised, or a declaration that it may be exercised anywhere within the prescribed limits, no such power being exercisable within the United Kingdom, or in any British possession in which the port of registry may be situate, or by any person not named in the certificate (*r*).

The certificate is to be in the form mentioned in the act, and is to contain a statement of the particulars directed to be entered in the register book, and an enumeration of any registered mortgages, or certificates of mortgage or sale, affecting the ships or shares in respect of which the certificate is given (*s*).

The power must be exercised conformably with the directions contained in the certificate, and a record of every mort-

(*n*) Sect. 74.

(*o*) Sect. 75.

(*p*) Sect. 76.

(*q*) Sect. 77 (1), (3), (2).

(*r*) Sect. 78.

(*s*) Sect. 79.

gage made thereunder is to be endorsed thereon by a registrar or British consular officer; and no mortgage *bond fide* made thereunder may be impeached by reason of the death, before the making of the mortgage, of the person by whom the power was given (*t*).

The certificate of mortgage may be cancelled by the registrar by whom it was granted upon delivery to him, and shall then become void; but before cancelling, he is to record in the register book, so as to preserve its priority, any unsatisfied mortgage which may be registered on the certificate (*u*), and also the fact of the cancellation.

Upon proof of the loss or obliteration of a certificate, and of what, if anything, has been done thereunder, or that nothing has been done, the registrar may issue a new certificate, or direct such entries to be made, or other matter or thing to be done, as might have been made or done, if there had been no loss or obliteration (*x*); and where the certificate specifies the place where the power is to be exercised, the registered owner may, by an instrument in the form mentioned in the statute, authorize the registrar who granted the certificate to give notice to the registrar or consular officer at such place that the certificate is revoked; and after such notice shall have been recorded by such registrar or consular officer, the certificate, as to any future mortgage to be made at such place, is deemed to be revoked and of none effect, and every registrar or consular officer recording any such notice shall thereupon state to the registrar who granted the certificate, whether any previous exercise of the power to which the certificate refers has taken place (*y*) (1722).

72. Although the statute of 1854 gives more minute directions concerning the form, execution and effect of mortgages than the repealed act of 8 & 9 Vict., it does not, like that statute, provide that no mortgage, or (as it stood there) bill of sale by way of mortgage, shall be effectual, unless it be registered, the provision being merely, that, upon production, the

(*t*) Sect. 80 (1), (2), (3).

(*u*) Sect. 80 (8).

(*x*) Sect. 82.

(*y*) Sect. 83.

mortgage shall be registered; whereas, by sect. 57, bills of sale are expressly required to be produced for registration. It was nevertheless held, that these alterations in form did not indicate an intention to change the policy of the former statute, or to recognize equitable interests (*z*).

But by the Merchant Shipping Amendment Act, 1862, it is declared (*a*) that the expression "beneficial interest," whenever used in the second part of the act of 1854 (which contains the above enactments), includes interests arising under contract and other equitable interests, and that the intention of the act of 1854 was, that, without prejudice to its provisions for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the act on registered owners and mortgagees, and without prejudice to the provisions relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.

The acts, therefore, clearly provide for the existence of equitable interests in ships; and a transfer which has been registered as absolute may be shown (*b*) to have been only meant as a security, and may be so treated.

A deposit of a registered mortgage of a ship will also create a valid security by way of equitable mortgage (*c*).

(*z*) *Liverpool Borough Bank v. Turner*, 1 J. & H. 159; 2 De G., F. & J. 502; 29 L. J., Ch. 827; 30 id. 379.

(*a*) 25 & 26 Vict. c. 63, s. 3.

(*b*) *Ward v. Beck*, 13 C.B., N. S. 668; 9 Jur., N. S. 912; *The Innisfallen*, L. R., 1 Adm. 72; and see *Hutchinson v. Wright*, 25 Beav. 451. And as to the rights of a purchaser whose bill of sale could not be registered because of his infancy, see *Stapleton v. Haymen*, 10 Jur., N. S. 497. It appears to have been intimated that, if an agreement for the purpose were clearly and completely

proved, the court might recognize the creditor in the double character of a mortgagee for the purposes of the debt, and of an absolute owner, for the purpose of giving him control over the movements of the ship (*The Innisfallen*, *supra*); but it is conceived that the result would be only to make him mortgagee in possession, and that he could not escape from the liabilities incident to that position.

(*c*) *Lacon v. Liffen*, 4 Gif. 75; 9 Jur., N. S. 13.

73. The act also provides (*d*) that no notice of any trust, express, implied or constructive, shall be entered in the register book or be receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of any ship or share therein shall have power absolutely to dispose of such ship or share in the manner mentioned in the act, and to give effectual receipts for the consideration money.

It has been held that the assignees in bankruptcy of the owner of a ship, where a mortgage made before the completion of the ship was registered after the ship was completed and registered, could not claim it as against the mortgagee on the ground that no mortgage having been executed after the registration of the ship, the owner's title remained absolute (*e*).

74. Before the act of 1854 a lien might have been created for some purposes upon a ship's certificate of registry, notwithstanding the statutes (*f*). But that act provides (*g*) that the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge or interest, which any owner, mortgagee or other person may have or claim in the ship; and the refusal to deliver it on demand to the person entitled to it for the purpose of navigation, officer of customs, or other person legally entitled to require it, is punishable by penalty.

It is therefore illegal to pledge the certificate, and the person entitled to it for the purpose of navigation, though himself the pledgor, may maintain an action (*h*) after demand for its delivery, and may recover damages for the wrongful detainer, in addition to his right to proceed for the penalty.

75. The provision of the act of 1854 (*i*), that if any person interested in any ship or any share therein is by reason of

*
(*d*) Sect. 43.

(*e*) *Bell v. Bank of London*, 3 H. & N. 730.

(*f*) *Mestaer v. Atkins*, 5 Taunt. 381;
Bowen v. Fox, 10 Barn. & Cr. 41;

Clarke v. Batters, 1 K. & Jo. 242. But see *Gibson v. Ingo*, 6 Hare, 112.

(*g*) Sect. 50.

(*h*) *Wiley v. Crawford*, 6 Jur., N. S. 1296; 1 B. & S. 253, 265.

(*i*) Sect. 99.

infancy, lunacy or other disability incapable of making any declaration, or doing anything required by the act in respect of registry, the guardian or committee of such person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested, may make the declaration or do the thing in the name and on the behalf of the incapable person, does not enable the guardian of an infant shipowner to mortgage the ship for repairs, although it may be that in the exercise of his necessary power to repair, a lien may be created upon the ship (*k*) (293).

76. The provision that persons beneficially interested in ships and shares of ships, shall, as well as the registered owner, be subject to pecuniary penalties imposed upon owners, excepts persons who are beneficially interested by way of mortgage (*l*).

77. The right of an insurer of ships, who is, but does not appear on the register as the mortgagee, to the proceeds of the policies, is not affected by the acts (*m*). Nor, although the right to the freight is incidental to the ownership and can be originally dealt with only by the owner of the vessel (*n*), is it necessary to comply with the acts in order to make a valid assignment of the present or future (*o*) freight of the ship, provided the object be carried out, not necessarily by a distinct instrument, but by a distinct contract, leaving the title to the freight in nowise dependent on the title to the ship (*p*).

In the absence of any special agreement the cargo (*q*) belongs to the mortgagor; and though the cargo of a whale ship, unlike an ordinary cargo, constitutes, instead of producing the earnings

(*k*) *Michael v. Fripp*, L. R., 17 Eq. 95.

(*l*) Sect. 100.

(*m*) *Ladbroke v. Lee*, 4 De G. & S. 106.

(*n*) *Morrison v. Parsons*, 2 Taunt. 407; *Lindsay v. Gibbs*, 2 Jur., N. S. 1039; 22 Beav. 522.

(*o*) *Douglas v. Russell*, 4 Sim. 524;

1 M. & K. 488; *Ship Warre, Re*, 8 Price, 269.

(*p*) *Mestaer v. Gillespie*, 11 Ves. 621; *Langton v. Horton*, 1 Hare, 549; *Gibson v. Ingo*, 6 Hare, 112; *Davenport v. Whitmore*, 2 M. & Cr. 177.

(*q*) *Alexander v. Simms*, 18 Beav. 83; *Branker v. Molyneux*, 3 Scott, N. R. 332.

of the ship, it is not incident to the employment of the ship as freight, and therefore will not pass by the assignment under the word “appurtenances,” but must be expressly described or mentioned in it(*r*).

78. The Admiralty Division of the High Court of Judicature has jurisdiction over any claims in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under the arrest of the court or not, and will enforce equities between owners and mortgagees of ships (*s*).

79. Mortgages of ships are not affected by the acts for the registration of bills of sale and assurances of chattels (*t*) (**63**).

CHAPTER I. PART 2.—OF PLEDGES OR PAWNS.

80. A pledge is a security by way of bailment of a personal chattel, by which a special or qualified property therein (*u*), sufficient to support an action against a person who wrongfully converts it (*x*), is vested in the pledgee (*7*), the general property remaining in the pledgor (*u*); and it is created by and is incomplete without an actual or constructive delivery of the thing pledged to or on behalf of the pledgee (*y*).

The pledgee is entitled to hold every separate thing which is comprised in the pledge, and also whatever, by natural in-

(*r*) *Langton v. Horton*, 5 Beav. 9.

(*s*) Admiralty Court Jurisdiction Act, 1861, 24 Vict. c. 10, s. 11; *The Cathcart*, L. R., 1 Ad. 314.

(*t*) 17 & 18 Vict. c. 36, s. 7.

(*u*) *Ratcliff v. Davies*, Cro. J. 244; *Yelv.* 178; *Coggs v. Bernard*, Ld. Raym. 909; 3 Salk. 268; *Holt*, 528; *Per Holt*, C. J., *Franklin v. Neate*, 13 M. & W. 481.

(*x*) *Ayers v. South Australian Banking Co.*, L. R., 3 P. C. 548; *per Mellish*, L. J.

(*y*) *Reeves v. Capper*, 5 Bing., N. C. 136; *Martin v. Reid*, 11 C. B., N. S. 730. See *Belcher v. Oldfield*, 6 Bing., N. C. 102; *Story*, Bailm. § 287. The contract of pawn is only perfected when the creditor has possession of the pledge. (*Hedaya*, Pawns, Ch. 1.) By an act of South Australia, 1855-6, No. 1, proprietors of sheep are enabled to make a valid pledge of the next clip of wool without possession. (*Ayers v. South Australian Banking Co.*, L. R., 3 P. C. 548.)

crease (456), becomes accessory to it, as a security for the whole debt (*z*); but upon payment or tender of the debt to the pledgee, the property in the goods, notwithstanding his refusal to deliver them, is instantly revested in the owner (*a*) (1272).

81. The property pledged may be anything of a personal nature, whether corporeal or otherwise, so that it be in existence, and capable of actual or symbolic delivery, and that the pawnor, or some person by whose consent he pawns, have a present possession and title (*b*). The delivery need not be actual, but may be constructive or symbolic—and the latter kinds of delivery may be either of goods which are, or are not, in the actual custody of the pledgor: of those which are, by delivery of the key of the warehouse in which they are contained, or of other evidence and means of obtaining possession: and of those which are not, by delivery of the documents of title, as the bill of lading of goods at sea, which will carry the right of possession even after the landing of the goods, so long as they have not come to the hands of the person entitled to receive them under the bill of lading (*c*); or by a request note entered in the book of the office of customs to hold the goods subject to the order of the pledgee (*d*). Or the possession of the pledgor himself may be deemed sufficient if by the contract

(*z*) Story, Bailm. §§ 292, 314. Per Holt, C. J., *Coggs v. Bernard*, supra.

(*a*) Yelv. 178; *Ryall v. Rolle*, 1 Atk. 165; per Dodderidge, J., in *Isaack v. Clark*, 2 Bulst. 306. It seems that the property would not be revested on tender by one only of several joint owners; but it was only decided that trover would not lie on refusal to deliver. *Harper v. Godsell*, L. R., 5 Q. B. 422.

(*b*) Story, Bailm. § 290, § 294.

(*c*) Story, Bailm. § 297; *Ryall v. Rolle*, 1 Atk. 171, per Burnett, J.; *Atkinson v. Maling*, 2 T. R. 462; *Westzintus, Exp.*, 5 B. & Ad. 817; *Meyerstein v. Barber*, L. R., 2 C. P. 38, 661; 4 E. & I. App. 317. In the last case the goods were landed at a sufferance wharf, at which by 11 & 12 Vict. c. xviii. they

remained subject to the same liabilities as when afloat; and see Merchant Shipping Amendment Act, 1862, s. 68. A doubt seems to have been expressed by Willes, J., whether the delivery of the key of a warehouse would be sufficient in case of a pledge, if another person afterwards obtained possession by means of a false key. In the case before him possession was obtained by the fraudulent use of the third part of the bill of lading, but it was held to be unavailing against the rights of the first pledgee. Is there any distinction in principle between the false key and the false bill of lading?

(*d*) *Young v. Lambert*, L. R., 3 P. C. 142.

it be made the possession of the pledgee (*e*), while that of the pledgor will not be affected by reason that the pledgor has the use of the chattel, provided it remain under the pledgee's control, and that the user be for the purpose of carrying out or be consistent with the contract (*f*) (1361).

82. It is of the essence of the contract that the thing should be held as security for some debt or engagement, either of the pledgor or of some other person; for if there be an assent by all proper parties, it is equally obligatory in each case. The pledge may be delivered as security either for a future or for a past debt or engagement; for one or many debts or engagements; upon condition or absolutely; or for a limited or indefinite time: it may be implied from circumstances, as well as arise by express agreement, and is not confined to engagements for the payment of money, but may be applied to any other lawful contract (*g*).

83. The pledgor impliedly undertakes (*h*) that he has an interest in the pledge, and that it shall be made effectual to answer the obligation (793). But it is not indispensable that the pledge should belong to the pledgor; it is sufficient if it be pledged with the consent of the owner, and it will be a good pledge even without his consent as between the parties. For the pledgor cannot assert that he is not the owner, and the pledgee cannot set up the *jus tertii* unless the third person enforces his own superior right of property (*i*).

But as against the real owner the pawnee will not acquire a special property in the chattel, if the person who assumes to pledge be himself without title, for the pawnee can have no greater right than the pawnor (*k*) (459). The mere possession,

(*e*) *Reeves v. Capper*, 5 Bing., N. C. 136; *Martin v. Reid*, 11 C. B., N. S. 730; *Meyerstein v. Barber*, L. R., 2 C. P. 52, per Willes, J.

(*f*) *Crowfoot v. London Dock Co.*, 2 Cr. & M. 637.

(*g*) *Story*, Bailm. § 300.

(*h*) *Id.* § 311; per Pollock, C. B., *Cheesman v. Exall*, 6 Exch. 341.

(*i*) *Story*, Bailm. § 291. See Garth

v. Howard, 5 Car. & P. 346, 350.

(*k*) *Hooper v. Ramsbottom*, 4 Camp. 121; *Cheesman v. Exall*, 6 Exch. 341; see *Waller v. Hanger*, 3 Bulst. 17. "A custom was claymed in London, that if any one did deliver goods in London in pledge to another, and the goods proved to be the goods of another, yet that he might keep them till he was satisfied. And held a bad cus-

obtained through false representations, of a document of title to a chattel will not support the title of a *bonâ fide* pawnee of the chattel for value, though without notice of the pledgor's want of title (*l*); and even where the pawnor, remaining in possession for a limited purpose under the original contract of pawn, or by the fraudulent use of a document of title, affects to pledge the chattel to another, the right remains in the first pawnee, though the second have actually obtained possession and have sold the chattel (*m*).

So if the pawnor be tenant for life or for years the pledge will only be coextensive with his interest, and the pawnee will have no further claim upon the chattels after the determination of that interest, though he had no notice of the settlement (*n*). And the bailee of goods of tenants in common cannot by the direction of one of them justify a pledge of the whole (*o*).

84. If there be no stipulation to the contrary, the pawnee may by common law, even before condition broken, deliver over the pawn into the hands of a stranger for safe custody without consideration; or he may sell his interest in the pawn, or assign it conditionally by way of pawn, without destroying or invalidating the security (*p*). But if he pledge the property, not being a negotiable security (for the lawful possessor of such a security may either pledge or sell it, so as to bind the rights

"tome; 35 H. 6, 26." (Sheppard's Abr. "Custome.") It is spoken of in West on Extents as a subsisting custom, but not binding the king where his goods are pledged by a stranger, on the authority of Plowden, 243, who in fact so states it; but refers to Bro. Abr. Prerog. 5, where it is only said that the king is not bound by sale in market overt; and to Fitzh. Cust. 2, where the custom was said to be bad, but that the king would not have been bound by it if it were good. (See Hartop v. Hoare, 3 Atk. 52.)

(*l*) Kingsford v. Merry, 26 L. J., Exch. (N. S.) 83; 1 H. & N. 503; Lamb v. Attenborough, 1 B. & S. 831.

(*m*) Reeves v. Capper, 5 Bing. N. C.

136; Meyerstein v. Barber, L. R., 2 C. P. 38, 661; 4 F. & I. App. 317. Per Martin, B.: The sale by a person allowed by the true owner to have possession of the goods, so that he is able to hold himself out as owner, probably only binds the true owner where the possessor, from the nature of his employment, had *prima facie* a right to sell. (Higsons v. Burton, 26 L. J., Exch. (N. S.) 342.)

(*n*) Hoare v. Parker, 2 T. R. 876.

(*o*) Barton v. Williams, 5 B. & Al. 395; 8 Bing. 139; 10 Moore, 596.

(*p*) Story, Bailm. § 324. See per Cook, Warburton, and Daniel, in Mores v. Conham, Owen, 123.

of the owner (*q*)), for a greater interest than he possesses, it is a breach of contract; but the act does not annihilate the contract of pledge between him and the original pawnor, but is inoperative against the latter, who upon tender of the sum secured becomes intitled to possession, and can recover for special damage sustained by the repledging; but without tender is not intitled to possession, and can only maintain an action for any damage.

Therefore where, upon non-payment on a certain day, the pledgee was empowered to sell, but sold before and delivered upon that day, although it was held to be a wrongful conversion, the interest of the pledgee in the property was considered not to have been destroyed; and as it appeared that the pledgor never intended to redeem, his right to damages was treated as only nominal, and as if he had sued on a breach of contract for not keeping the pledge till the day fixed (*r*). And again, where the pawnee had repledged for a larger sum than was due to him on the original pawn, it was held that the first pawnor could not bring detinue against the second pawnee, without tendering the amount due to the first pawnee (*s*).

The custom of London that a sale in market overt will bind the property of a stranger does not extend to pawns (*t*).

85. The mere refusal to redeliver the pledge to the pawnor is, however, not a conversion. It is for the jury to say whether the holder intended to apply it to his own use, to assert the title of a third person, or only to ascertain the true ownership, and in the latter case whether a reasonable time had elapsed, for that purpose (*u*).

86. If the pledgor be not the true owner of the chattel, and have no special property in it which he may assert against the

(*q*) Story, Bailm. § 296; *Miller v. Race*, 1 Bur. 452; *Grant v. Vaughan*, 3 id. 1516; *Wookey v. Pole*, 4 B. & Al. 1.

(*r*) *Johnstone v. Stear*, 15 C. B., N. S. 330; 10 Jur., N. S. 99; *Donald v. Suckling*, L. R., 1 Q. B. 585; 7 B. & S. 783; *Halliday v. Holgate*, L. R., 3 Ex.

299; see *Chinery v. Viall*, 5 H. & N. 288; *Brierly v. Kendall*, 17 Q. B. 937; Story, Bailm. § 315.

(*s*) *Donald v. Suckling*, *supra*.

(*t*) *Hartop v. Hoare*, per Lee, C. J., 3 Atk. 44.

(*u*) *Vaughan v. Watt*, 6 M. & W. 492.

true owner, the pawnee may deliver the chattel to the latter (*x*); being however answerable in damages, though they may be only nominal, if he have absolutely contracted to redeliver it to the pawnor (*y*). Or, if the pawnor held the chattel merely as a pledge from the true owner, the second pawnee may discharge himself by delivering it to his own pawnor, at any time before an offer by the true owner to redeem (*x*).

87. An agreement that the pledgee shall have a power of sale appears not to alter the general nature of the transaction (*z*), or to turn it into a mortgage.

88. In cases of executions against private persons, a creditor of the pawnor cannot take the pledge from the pawnee, without first discharging the pawnee's claim, or otherwise extinguishing his title (*a*). It is said, that if A. gage goods to B., and afterwards A. is attainted of felony, the king shall not have the goods thus gaged without payment of the sum for which they were gaged; for his prerogative shall never prejudice another: and again, if the pawnor be *utlagatus*, the king shall not have the goods before the party be satisfied (*b*). But the right of the crown is good against the pledgee as to duties for which the pledgor was responsible at the date of the pledge (*c*).

As to the right of distress or execution against the pawn, in the hands of the pawnee, for his own debt, the pawn is protected in the case of a professional pawnbroker upon the principle generally applicable to goods intrusted to persons who carry on a public trade, and who manage and deal with goods in the way of their trade (*d*); as well as because the pawnee is bound

(*x*) Story, Bailm. § 340.

(*y*) Per Pollock, C. B., in Cheesman v. Exall, 6 Exch. 341.

(*z*) Franklin v. Neate, 13 M. & W. 481.

(*a*) Story, Bailm. § 353.

(*b*) Nichols v. Nichols, Plowden, 477, per Harper, J.; Vin. Abr. Pawn.; Waller v. Hanger, 3 Bulst. 17.

(*c*) Att.-Gen. v. Trueman, 11 M. & W. 694.

(*d*) Swire v. Leach, 18 C. B., N. S.

479; 11 Jur., N. S. 178. The protection of the pledge from distress is probably of great antiquity. By the forest laws, "if a man who is amerced doth afterwards pawn or pledge the cattle which be in the forest to another, in such case the beadle cannot distraint the same so long as they are in pawn." (Manwood, 103, § 14.) So the Hedāya says, "it is recorded in the traditions, that no pledge shall be distrained for debt." (Pawns, Ch. 1.)

to restore the pledge upon redemption (80), which appears to be a sufficient ground for protection in the case of a general pawn.

89. The pledgor by virtue of his general property may also sell and transfer to the purchaser all his right in the pledge ; and if on tender by the latter of the amount due to the pledgee he refuse to deliver the pledge, the purchaser has a remedy in trover as well as in equity for redemption (*e*).

90. The business of professional pawnees or pawnbrokers is regulated by the Pawnbrokers Act, 1872 (*f*), by which a pawnbroker is defined to be a person who carries on the business of taking goods and chattels in pawn, *i. e.*, who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives or takes in goods or chattels and pays or advances or lends thereon any sum of money not exceeding 10*l.*, with or under an agreement or understanding, express or implied, or to be from the nature and character of the dealing reasonably inferred, that these goods or chattels may be afterwards redeemed or repurchased on any terms ; and every such transaction, article, payment, advance and loan shall be deemed a pawning pledge and loan within the act (*g*).

91. The executors or administrators of deceased pawnbrokers are within the act, but are not answerable for any penalty or forfeiture personally or out of their own estate, unless it be incurred by their own act or neglect (*h*).

Anything done or omitted by the servant, apprentice or agent of a pawnbroker in the course of the business shall be deemed to be done or omitted by the pawnbroker ; and anything authorized to be done by him may be done by his servant, apprentice or agent (*i*).

The rights, powers and benefits given to pawnors extend to

(*e*) *Franklin v. Neate*, 13 M. & W.
481; *Story, Bailm.* § 350.
(*f*) 35 & 36 Vict. c. 93.

(*g*) Sects. 5, 6.
(*h*) Sect. 7.
(*i*) Sect. 8.

their executors, administrators and assigns; who, however, if required, shall produce to the pawnbroker the assignment, probate, letters of administration or other instrument under which he claims (*k*).

92. The act applies to every loan by a pawnbroker of 40*s.* or under, or (except as is otherwise provided in relation to cases of special contract under the act (**96**)) to every loan of above 40*s.* and not above 10*l.* (*l*).

93. The pawnbroker is required to keep the books and documents described in the third schedule to the act, and to make the entries and inquiries indicated (*m*); he is to keep exhibited in large characters over the outer door of his shop, so as to be legible by every person pawning or redeeming, standing in any box or place provided in the shop for that purpose, the information by the rules of the third schedule required to be printed on pawn-tickets (*n*).

94. A pawnbroker shall on taking a pledge in pawn give to the pawner a pawn-ticket, and shall not take a pledge in pawn unless the pawner takes the pawn-ticket (*o*).

95. A pawnbroker may take profit on a loan on a pledge at a rate not exceeding—

A. On a loan of forty shillings or under—

For any time during which the pledge remains in pawn not exceeding one month, for every two shillings or fraction of two shillings lent, one halfpenny;

For every month after the first, including the current month in which the pledge is redeemed, although that month is not expired, for every two shillings or fraction of two shillings lent, one halfpenny.

If the pledge is redeemed before the end of the first fourteen days after the expiration of any month, in respect of those

(*k*) Sect. 9.

(*l*) Sect. 10.

(*m*) Sect. 12.

(*n*) Sect. 13.

(*o*) Sect. 14.

fourteen days, half of the amount which he would be entitled to take for the whole month.

B. On a loan of above forty shillings—

For every month or part of a month for every sum of two shillings and sixpence or fraction of a sum of two shillings and sixpence, one halfpenny.

A pawnbroker may demand and take the charges following, viz. :—

On pawn ticket—

Where the loan is ten shillings or under, one halfpenny.

Where the loan is above ten shillings, one penny.

On inspection of sale book—

For the inspection of the entry of a sale, one penny.

On form of declaration—

Where the loan is five shillings or under, one halfpenny.

Where the loan is above five shillings, one penny.

This sum is to be paid by the applicant at the time of application.

A pawnbroker shall not, in respect of a loan on a pledge, take any profit, or demand or take any charge or sum whatever, other than those above specified (*p*).

96. A pawnbroker may make a special contract with a pawner in respect of a pledge for a loan above forty shillings, provided that at the time of pawning he delivers to the pawner a special contract pawn-ticket signed by himself; and that a duplicate thereof be signed by the pawner. Neither the ticket nor the duplicate is subject to stamp duty (*q*).

97. If any person is convicted under the act in a court of summary jurisdiction of knowingly and designedly pawning with a pawnbroker anything being the property of another person, the pawner not being employed or authorized by the owner thereof to pawn the same; or is convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker; or if in any proceedings before a court

of summary jurisdiction it appears to the court that any goods and chattels brought before the court have been unlawfully pawned with a pawnbroker; the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting (*r*).

98. If a pawnbroker—

- (1.) Takes an article in pawn from any person appearing to be under the age of twelve years or to be intoxicated;
- (2.) Purchases or takes in pawn or exchange a pawn-ticket issued by another pawnbroker;
- (3.) Employs any servant or apprentice or other person under the age of sixteen years to take pledges in pawn;
- (4.) Carries on the business of a pawnbroker on Sunday, Good Friday or Christmas Day, or a day appointed for public fast, humiliation or thanksgiving;
- (5.) Under any pretence purchases, except at public auction, any pledge while in pawn with him;
- (6.) Suffers any pledge while in pawn with him to be redeemed with a view to his purchasing it;
- (7.) Makes any contract or agreement with any person pawning or offering to pawn any article, or with the owner thereof, for the purchase, sale or disposition thereof within the time of redemption;
- (8.) Sells or otherwise disposes of any pledge pawned with him except at such time and in such manner as authorized by the act;

he shall be deemed guilty of an offence against the act (*s*).

99. If any person knowingly and designedly pawns with a pawnbroker anything being the property of another person, the pawner not being employed or authorized by the owner thereof to pawn the same, he shall be guilty of an offence against the act, and shall be liable, on conviction thereof in a court of summary jurisdiction, to forfeit any sum not exceeding five pounds, and, in addition thereto, any sum not exceeding the full value of the pledge as ascertained by the court.

The forfeitures when recovered shall be applied towards making satisfaction thereout to the party injured, and defraying the costs of prosecution, as the court directs; but if the party injured declines to accept of such satisfaction and costs, or if there is any surplus of the forfeitures, then the forfeitures or surplus (as the case may be) shall be paid to the overseers of the poor of the parish or place where the offence is committed, for the use of the poor thereof(*t*).

100. If any person—

- (1.) Offers to a pawnbroker an article by way of pawn, being unable or refusing to give a satisfactory account of the means by which he became possessed of the article;
- (2.) Wilfully gives false information to a pawnbroker as to whether an article offered by him in pawn to the pawnbroker is his own property or not, or as to his name and address, or as to the name and address of the owner of the article;
- (3.) Not being entitled to redeem, and not having any colour of title by law to redeem, a pledge, attempts or endeavours to redeem the same;

he shall be guilty of an offence against the act.

In every such case, and also in any case where, on an article being offered in pawn to a pawnbroker he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, the pawnbroker may seize and detain the person and the article, or either of them, and shall deliver the person and

the article, or either of them (as the case be), as soon as may be into the custody of a constable, who shall as soon as may be convey the person, if so detained, before a justice, to be dealt with according to law.

The justice may, if he thinks fit, on the request of the pawnbroker grant to him a certificate of the amount of the compensation which the justice deems reasonable for the pawnbroker's expenses, trouble and loss of time in and about the seizure, detention and delivery, which certificate shall have the effect of an order of court for the payment of the expenses of a prosecution made under the act of 7 Geo. 4, c. 64, and the acts amending the same; and the amount mentioned in the certificate shall be paid as money mentioned in such an order; and the certificate shall be subject to the like regulations as certificates mentioned in the last-mentioned acts (*u*).

101. If a pawnbroker knowingly takes in pawn any linen or apparel or unfinished goods or materials intrusted to any person to wash, scour, iron, mend, manufacture, work up, finish or make up, he shall be guilty of an offence against the act, and shall be liable, on conviction thereof in a court of summary jurisdiction, to forfeit a sum not exceeding double the amount of the loan (which forfeiture shall be paid to the overseers of the poor of the parish where the offence is committed, for the use of the poor thereof); and the pawnbroker shall likewise restore the pledge to the owner thereof, in the presence of the court, or as the court directs (*x*).

If the owner of any linen, apparel, unfinished goods, or materials intrusted to any person as aforesaid, and unlawfully pawned, or the owner of any other article unlawfully pawned (the last-mentioned owner having on oath satisfied a justice that his goods have been unlawfully obtained or taken from him), makes out on oath before a justice that there is good cause to suspect that a pawnbroker has taken in pawn the linen, apparel, goods, materials, or article aforesaid, without the privity or authority of the owner, and makes appear to the satisfaction of

(*u*) Sect. 34

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(*x*) Sect. 35.

the justice probable grounds for such suspicion, the justice may issue his warrant for searching, within the hours of business, the shop of the pawnbroker.

If the pawnbroker, on request by a constable authorized by the warrant, refuses to open the shop and permit it to be searched, a constable may break it open within the hours of business, and search as he thinks fit therein for the linen, apparel, goods, materials, or article aforesaid, doing no wilful damage; and if any pawnbroker or other person opposes or hinders the search, he shall be guilty of an offence against the act.

If on the search any linen, apparel, goods, materials, or article aforesaid, is or are found, and the property of the owner thereof is made out to the satisfaction of a court of summary jurisdiction, the court shall cause the same to be forthwith restored to the owner thereof (83).

102. If a pawnbroker is convicted on indictment of any fraud in his business, or of receiving stolen goods knowing them to be stolen, the court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly.

103. After the passing of the act, except as to existing licensed pawnbrokers, a pawnbroker's licence shall not be granted to any person except on the production and in pursuance of the authority of a certificate granted under the act.

Any licence granted in contravention of this section shall be void.

104. Certificates under the act shall be granted (as regards England) in the metropolitan police district by a magistrate sitting in any police court in the metropolis having jurisdiction in the district where the application is made, and in any place within the jurisdiction of a stipendiary magistrate by that magistrate, and in other places by the justices of the petty sessional division assembled at petty sessions specially convened for that purpose (y).

CHAPTER I. PART 3.—OF HYPOTHECATIONS.

105. An HYPOTHECATION is a security whereby real or personal estate is merely appropriated for the discharge of a debt or engagement, but which does not pass the property in the subject of the security to the creditor. An hypothecation may be ORDINARY or MARITIME (8).

OF ORDINARY HYPOTHECATIONS.

106. An ordinary hypothecation may be created—

1. By a *charge* or direction in a settlement, will, or other instrument, whereby real or personal property is expressly or constructively made liable or specially appropriated to the discharge of a portion, legacy or other burthen, or declared to be subject to a lien for securing the same.
2. By the appropriation to the discharge of a debt, of specific choses in action or chattels in the hands of a third person. This form of hypothecation is commonly known as an *equitable assignment*.

107. An agreement for a lien does not confer an actual lien, which is a right given by the law (9); but it excludes the lien, and limits the rights of the parties by the terms of the express contract (z).

An agreement or direction which operates as an hypothecation cannot be rescinded by the maker, after he has received the benefit in consideration of which it was given (a).

Subject to the terms of the express contract or mandate, by which hypothecation in either of the above forms is effected, and to the special rights thereby created, the rights correspond with such as arise under actual liens.

Of Charges and Agreements for Liens.

108. A simple covenant or agreement (b) to charge land will not create a charge upon the debtor's real estate where no

(z) *Walker v. Birch*, 6 T. R. 258, per Lord Kenyon; *Gladstone v. Birley*, 2 Mer. 404, per Sir W. Grant; *Leith, Re* (*Chambers v. Davidson*), L. R., 1 P. C. 305, per Lord Westbury.

(a) *Vertue v. Jewell*, 4 Camp. 31; *Fisher v. Miller*, 1 Bing. 150; 7 Moo. 527.

(b) The principles of these decisions apply also to agreements to mortgage.

particular land is mentioned, or the agreement is only for a personal, with power to call for a real, security, or where it otherwise appears to be intended to rely only upon the covenant (c). Therefore a covenant or written promise to give a security by mortgage, or to sell lands when required (d), or a mere covenant to settle lands of a certain value (e), or at or within a certain time, will not amount to an equitable charge. It is otherwise if the covenantor agree to charge property or the income of property already in his possession (f), or such as he may hereafter acquire of a specified kind or to be derived from a specified source (g); or if he point out by a subsequent instrument particular lands as those which were intended to be charged (h). And where an intended husband gave a bond to convey sufficient real estate to secure his wife a certain annuity in bar of dower, which she accepted, the obligation was held (i) to be a charge upon the real estates of which the husband died seised in fee, but only to an amount not exceeding the dower which but for the annuity she might have claimed. And a bond conditioned to be void if the intended husband should become seised of any real estate in possession, and should settle it on the intended wife and the issue, was held (k) to bind all the real estate of which he became seised during his life, though he survived his wife and married again, and the obligation was recited to be for making better provision for the wife if she should survive him. But an obligation merely limited to the real and personal estate of the covenantor, will affect only that of which he dies possessed, and not such as did not belong to him at his death, whether

(c) *Collins v. Plummer*, 1 P. W. 104.

(d) *Williams v. Lucas*, 2 Cox, 160; *Berrington v. Evans*, 3 Y. & C. 384.

(e) *Freemoult v. Dedire*, 1 P. W. 429; *Mornington v. Keene*, 2 De G. & J. 292; 4 Jur., N. S. 981; notwithstanding *Roundell v. Breary*, 2 Vern. 481, misreported; see 2 De G. & J. 319, note. See *Sankey Brook Coal Co., Re*, L. R., 12 Eq. 472, where the security failed because the company which gave it only as a going concern had passed

into liquidation.

(f) *Legard v. Hodges*, 1 Ves. J. 477; *Ravenshaw v. Hollier*, 7 Sim. 3.

(g) *Metcalf v. Archbishop of York*, 1 M. & C. 547; 6 Sim. 224; *Lyde v. Minn*, 1 M. & K. 688; 4 Sim. 505; *Buller v. Plunkett*, 7 Jur., N. S. 873.

(h) *Watson v. Sadleir*, 1 Mol. 585.

(i) *Tew v. Earl of Winterton*, 3 Bro. C. C. 493.

(k) *Prebble v. Boghurst*, 1 Sw. 321. See S. C. 1 Wils. Ch. 161; 7 Taunt. 538.

he had it at the date of the obligation or acquired it afterwards (*l*).

Where the covenant is to make a charge at a future period, on the arrival of which the covenantor is in possession of lands which he has acquired for the very purpose of the charge, there will also be a charge upon those lands (*m*). And it will even be assumed, where a man has bound himself to do a certain act and does something which may enable him to fulfil his obligation, that he acted with the view of fulfilling it. So that where there is a covenant to pay money to trustees to be laid out in the purchase of lands, or to purchase and settle lands, and the covenantor purchases lands but does not settle them or pay the money, the lands will be taken to have been purchased in performance of, and will be subject to, the covenant (*n*). The lands must be acquired subsequently to the covenant, and by purchase, or in a manner consistent with the presumption that the object was to fulfil the covenant. Therefore there was no charge upon lands to which the covenantor was entitled at the date of the covenant, and for the conveyance of which he afterwards obtained a decree (*o*). The presumption also will not arise where the settlement contains only a power and not an express trust to purchase lands; nor any covenant by the husband to purchase and settle (*p*). And the expenditure of money by the covenantor in building upon the land of the covenantee will not be admitted as a satisfaction of the covenant to pay the money to him where it does not appear that the outlay was so intended (*q*).

A covenant that land settled for jointure is of a certain yearly value will create a charge for that amount on the estate of the covenantor (*r*). And an agreement to charge a mortgage security upon an estate, which at the date of the agreement

(*l*) *Needham v. Smith*, 4 Russ. 318.

(*m*) *Wellesley v. Wellesley*, 4 M. & C. 561.

(*n*) *Sowden v. Sowden*, 1 Bro. C. C. 582; *Lechmere v. Lechmere*, Ca. temp. Talbot, 80; 3 P. Wms. 211; *Wilcox v.*

Wilcox, 2 Vern. 558; and see *Tooke v. Hastings*, id. 97.

(*o*) *Gardner v. Marquis Townshend*, G. Coop. 301.

(*p*) *Lench v. Lench*, 10 Ves. 511.

(*q*) *Wiles v. Gresham*, 2 Dr. 258.

(*r*) *Probert v. Morgan*, 1 Atk. 440.

has been sold, will bind the interest of the person who makes the charge in the purchase money (*s*).

No charge will generally be created by a covenant in a lease to keep chattels of a certain value on the premises as security for the rent, as against the assignees in bankruptcy of the covenantor claiming by virtue of his reputed ownership (*t*); though it seems that such a charge may arise where, by reason of the custom of the neighbourhood to insert such covenants in leases, possession of the chattels by the tenant may not be *prima facie* evidence of unincumbered ownership.

109. An equitable security may also be established by parol or other evidence of arrangements which are the subject of a separate agreement, or are referred to in a deed relating to the transaction out of which the security is held to arise; as where (*u*) incumbrancers had joined in assigning their security, upon the terms that they should be secured by subsequent mortgages, which were never executed; and were held entitled to an equitable charge as second incumbrancers. So upon real estate, in favour of the obligee of a bond, by a recital therein, that the obligor had become possessed of the estate under a certain will, upon the execution whereof he had promised the testator to provide for the obligee (*x*). So where the rent arising under a lease was assigned to the creditor (*y*), there being in the assignment a recital that a security was intended, and a covenant for further assurance of the rent, the covenant was held to be in equity a covenant to make a mortgage, and the case to be within the rules of equitable mortgages.

Of Equitable Assignments.

110. An equitable assignment may be made either by an agreement between a debtor and his creditor, that a specific

(*s*) Rogers, Exp., 2 Jur., N. S. 480;
8 De G., M. & G. 271.

(*t*) Shuttleworth v. Hernaman, 1 De
G. & J. 322.

(*u*) Banks v. Whittall, 1 De G. & S.

536; Beckett v. Cordley, 1 Bro. C. C.
353.

(*x*) Atkins, Exp., 2 Y. & C. 536.

(*y*) Wills, Exp., 2 Cox, 233.

chose in action or chattel in the hands of a third person, and which belongs to the debtor, shall be applied in discharge of the debt (*z*); or by an order given by the debtor, whereby the holder of the fund is directed to pay it to the creditor (*a*). And it may be made either by writing (*b*), or verbally (*c*); no particular words being necessary (*d*) so that the intention be sufficiently expressed (*e*).

The equitable assignee of a debt is not in the same position as to the obligation of using diligence as the holder of a bill of exchange or promissory note, the security being of a different character, and governed by mercantile law; but like a mortgagee he is chargeable with wilful default (*f*).

111. An equitable assignment will not be valid unless there be an engagement both to pay the debt and to pay it out of a particular fund (*g*); and to the person who claims under the assignment (*h*). And it is not necessary that the exact amount, either of the debt to be paid, or of that out of which it is directed to be paid, should be ascertained (*i*).

An equitable assignment has been supported, although the holder of the goods to whom the order was addressed was a partner in the firm to which the subject of the assignment

(*z*) *Flower, Exp.*, 4 D. & C. 449; *Riccard v. Prichard*, 1 K. & J. 277; *Bell, Exp.*, 17 L. J., N. S., Bk. 9.

(*a*) *Row v. Dawson*, 1 Ves. 331; *Burn v. Carvalho*, 7 Sim. 109, 4 M. & C. 690; *Crowfoot v. Gurney*, 2 Moo. & Sc. 473; *Steward, Exp.*, 3 M., D. & De G. 265; *Rodick v. Gandell*, 1 De G., M. & G. 763, per Lord Truro.

(*b*) *Lett v. Morris*, 4 Sim. 607; *Diplock v. Hammond*, 2 S. & G. 141, 5 De G., M. & G. 320.

(*c*) *Tibbits v. George*, 5 A. & E. 107; *Gurnell v. Gardner*, 9 Jur., N. S. 1220; and see *Riccard v. Prichard*, 1 K. & J. 277.

(*d*) *Row v. Dawson*, 1 Ves. 331, per Lord Hardwicke; *Bell v. Lond. & N. W. Rail. Co.*, 15 Beav. 548, per Lord

Romilly; see *Hopkinson v. Forster*, L. R., 19 Eq. 74.

(*e*) *Chowne v. Baylis*, 31 Beav. 351; 8 Jur., N. S. 1028.

(*f*) *Glyn v. Hood*, 1 De G., F. & J. 334, per Turner, L. J.

(*g*) *Watson v. Duke of Wellington*, 1 R. & M. 602; *Jones v. Starkey*, 16 Jur. 510; *Thomson v. Simpson*, L. R., 5 Ch. 659; *Citizens' Bank Louisiana, v. First National Bank, New Orleans*, L. R., 6 E. & I. App. 352.

(*h*) *Steward, Exp.*, 3 M., D. & De G. 265; *Bell v. Lond. & N. W. Rail. Co.*, 15 Beav. 548.

(*i*) *Hutchinson v. Heyworth*, 9 A. & E. 375; *Crowfoot v. Gurney*, 2 Moo. & Sc. 473; *Riccard v. Prichard*, 1 K. & J. 277.

belonged, and on account of which the order was given, he being at a distance from the giver of the order (*k*).

112. The engagement that the particular fund shall be made liable to the debt, must be unequivocal. A letter to the holder of the fund, stating that a particular person is a claimant upon it, is not an assignment (*l*); nor is an intimation to the creditor by his debtor that he has made arrangements for payment of the debt out of a fund over which he still retains the control; or a promise to pay it out of a particular debt or fund,—such an arrangement being countermandable (*m*); and the debtor's statement to the creditor that the arrival of a certain expected ship will put him in funds to adjust his account, or a direction in a bill of exchange to place it against a particular account, will be equally inoperative (*n*). Nor is an assignment created by giving an authority to a person without interest in the debt to receive it, though he promise to pay it to the creditor of the person who gives the authority; because such a transaction embraces neither a direction to the person who owes the money, nor a direct agreement between the debtor and the creditor (*o*). A cheque is not an equitable assignment of the drawer's balance at his bankers, being in the nature of a bill of exchange (*p*).

113. An equitable assignment was always complete in equity without the consent of the holder of the fund to apply it to the purpose pointed out by the assignment; and it will stand though the person who gives it become bankrupt, or die before it reaches the holder of the goods, or can otherwise be acted on (*q*); or formerly though the giver were arrested for the debt by the person in whose favour the order was made (*r*). It will

(*k*) *Rayner v. Harford*, 27 L. J., N. S., Ch. 708; 4 Jur., N. S. 708.

(*l*) *Watson v. Duke of Wellington*, 1 R. & M. 602.

(*m*) *Malcolm v. Scott*, 3 Hare, 39; *Bradley v. —*, Ridg. Ch. 194; *Field v. Megaw*, L. R., 4 C. P. 660; and see *Thomson v. Simpson*, L. R., 9 Eq. 497; 5 Ch. 659.

(*n*) *Jones v. Starkey*, 16 Jur. 510;

Carruthers, Exp., 3 De G. & S. 570; *Robey v. Ollier*, L. R., 7 Ch. 695.

(*o*) *Rodick v. Gandell*, 12 Beav. 325; 1 De G., M. & G. 763.

(*p*) *Hopkinson v. Forster*, L. R., 19 Eq. 74.

(*q*) *South, Exp.*, 3 Sw. 392; *Barn v. Carvalho*, 4 M. & C. 690; *Gurnell v. Gardner*, 9 Jur., N. S. 1220.

(*r*) *Alderson, Exp.*, 1 Mad. 53.

also be good as between the assignor and assignee, without notice of it to the holder of the fund (*s*); though to prevent the debtor from afterwards paying the fund to the assignee it is proper that such notice should be given.

114. An equitable assignment was formerly not complete at law without the express or implied consent of the holder of the fund, to apply or hold it for the benefit of the person claiming under the assignment (*t*). But where consignments had been received and applied under an arrangement in keeping down an annuity, the application was held to amount to an undertaking by the consignee to continue the payments, so far as the consignments should be sufficient (*u*). The rule in equity was, however, acted upon at law in an action against a person claiming the benefit of the assignment (*x*); and it seems will now prevail in all cases which do not fall within the statutory law relating to absolute assignments.

115. But, by statute, any absolute assignment by writing under the hand of the assignor (*not purporting* to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a legal discharge for the same without the concurrence of the assignor. Provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action, shall have had notice that

(*s*) *Rodick v. Gandell*, 1 De G., M. & G. 763, per Lord Truro; see *Rayner v. Harford*, *supra*.

(*t*) *Williams v. Everett*, 14 East, 582; *Crowfoot v. Gurney*, 2 Moo. & Sc. 473; 9 Bing. 372; 2 L. J., N. S., Ch. 21;

South, Exp., 3 Sw. 392, per Lord Eldon.

(*u*) *Fitzgerald v. Stewart*, 2 R. & M. 457; S. C., 2 Sim. 383; *Kirwan v. Daniel*, 5 Hare, 493.

(*x*) *Tibbits v. George*, 5 A. & E. 107.

such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto, to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees (*y*).

As under this act an absolute assignment passes the property in the chose in action, it is not an hypothecation ; (8) if the assignment purport to be by way of charge only it will operate as heretofore ; but if it purport to be absolute, or do not purport to be by any way of charge, yet is shown by other evidence to be so, it does not appear what will be the effect of the statute.

116. When a debtor has received notice of an equitable assignment of the debt he is bound to pay it to the assignee, although the latter refuse to give him an indemnity ; and it is no excuse for refusal and payment to the assignor that he has brought an action to recover it, to which the debtor has no defence at law ; for the court will indemnify him by making the wrongful claimant pay the costs. And the fact that, after the assignment, the assignor has become bankrupt, or has made a composition with his creditors, makes no difference (*z*). But the holder of the property, even though he have accepted notice of the assignment, is not bound to deliver it to the assignee, unless the assignee's title be complete according to the law of the country where the property is situate (*a*).

OF MARITIME HYPOTHECATION.

117. MARITIME hypothecation may be by way of BOTTOMRY or RESPONDENTIA.

Bottomry, or, as it was called in the law French, *bottomage*, is a security, some form of which has been used among

(*y*) Supreme Court of Judicature Act, 1873, c. 66, s. 25, (6); from 1 Nov. 1875, Judicature Amendment Act, 1874, c. 83, s. 2.

(*z*) *Hutchinson v. Heyworth*, 9 A. &

E. 375; *Jones v. Farrell*, 1 De G. & J. 208, subject to the statutory provision as to conflicting claims, *supra*.

(*a*) *Sichell v. Raphael*, 10 Jur., N. S. 1165.

maritime nations from remote antiquity, and by which, formerly, the keel or bottom of the ship as representing her entire fabric, rigging and stores, and now, more often, all these specifically, are made a security for the repayment of money advanced for the repairs of the ship, or for other purposes necessary for the safe prosecution of her voyage. It may be defined as the hypothecation of a ship with or without its freight and cargo as a security for the payment, in the event only of the safe arrival of the ship at her destination, of a debt contracted for the supply of necessities for the preservation of the ship and the continuance of the voyage; the debt being lost in case of the non-arrival of the ship (*b*).

118. It is effected by a writing, commonly called a bottomry bond, signed by the maker, and which may also be under seal, and may be executed on land (*c*). It was always treated as a negotiable instrument in Courts of Equity, including the Court of Admiralty (*d*), but not at law; but, like other choses in action, it is now assignable at law where the assignment is under the hand of the assignor, and does not purport to be by way of charge only (*e*).

No particular form is necessary (*f*) for a bottomry bond, but there must be a maritime risk to be ascertained from the contents of the instrument (*g*). An instrument in the form of a bill of sale may operate by way of bottomry if hypothecation were intended (*h*); but not if the intention were to effect a sale (*i*). A bill of exchange will not operate by way of bottomry, though it be given for money borrowed for the repairs of the ship, and refer to such repairs (*k*). It seems that an agreement for a bottomry bond may be enforced in the absence of

(*b*) *Atlas*, 2 Hag. Ad. 48; *Soares v. Rahn* (Prince of Saxe Coburg), 3 Moo. P. C. 1, per Dr. Lushington; *Osmanli*, 3 W. Rob. 198; 7 N. of C. 322.

(*c*) *Menetone v. Gibbons*, 3 T. R. 267.

(*d*) *Rebecca*, 5 Rob. Ad. 102; *William*, Swab. Ad. 346; 31 L. T. 345.

(*e*) *Judicature Act*, 1873, sect. 25, (6).

(*f*) *Alexander*, 1 Dods. 278, per Lord

Stowell; *Mary Ann*, L. R., 1 Ad. 13, per Dr. Lushington.

(*g*) Per Dr. Lushington, L. R., 1 Ad. 14.

(*h*) *Johnson v. Shippen*, 2 Lord Raym. 982; 1 Salk. 35.

(*i*) *Ridgway v. Roberts*, 4 Hare, 106.

(*k*) *Eenrom*, 2 C. Rob. 1; *Halkett*, Exp., 3 V. & B. 135; 10 Ves. 474.

a complete hypothecation, if money have been *bonâ fide* advanced for the necessity of the ship on the faith of the agreement (*l*).

119. A bottomry bond may be valid although its execution preceded the loan, if the lender pledged his credit for the payment of the money, and paid it in due time (*m*); and although its execution followed the loan, or even the commencement of the voyage, if the loan was made on an agreement for bottomry (*n*). And if originally valid, it is not affected by the agreement of the bondholder to purchase the ship (*o*). But if by agreement the time for payment be postponed, the contract, being no longer founded on the necessity of the ship, is only personal, and has no validity as a bottomry bond (*p*).

120. Bottomry bonds, for the benefit of shipowners and for the advantage of commerce, are greatly favoured in maritime courts, and where there is no suspicion of fraud, every fair presumption is to be made to support them. Such parts of them as are inconsistent with the rules of bottomry may also be rejected without affecting the validity of the security (*q*). The Admiralty Division of the High Court exercises a jurisdiction *in rem* in respect of all such hypothecations as possess the essential requisites of bottomry, including all matters respecting freight.

121. Questions relating to a bottomry bond payable upon the arrival of the ship at a British port, and which depend upon rules established by the English courts, will be determined by the general maritime law as administered in England, and not by the law of the ship's flag, or of the place at which the bond was executed (*r*).

(*l*) Alexander, 1 Dods. 278; see Aline, 1 W. Rob. 111.

(*m*) Royal Arch, Swab. 269.

(*n*) La Ysabel, 1 Dods. 273; Vibilia, 1 W. Rob. 1; Trident, id. 29.

(*o*) Helgoland, Swab. 491.

(*p*) Royal Arch, supra

(*q*) Augusta, 1 Dods. 283; Osmanli,

3 W. Rob. 198; Smith v. Gould (Prince George), 4 Moo. P. C. 21, per Lord Campbell.

(*r*) Bonaparte, 3 W. Rob. 398; Duranty v. Hart (Hamburg), 2 Moo. P. C., N. S. 289; B. & L. 258; and remarks in judgment by Willes, J., Lloyd v. Guibert, L. R., 1 Q. B. 115.

122. The hypothecation by way of bottomry of the keel or bottom of the ship operates upon the whole ship with its rigging and stores, including such as may have been temporarily detached for safe custody (*s*). If the ship only be hypothecated without mention of the freight, the freight will not be liable to the bondholder (*t*). But if the ship and cargo, or the cargo alone, be hypothecated, the freight in the one case, and the ship and freight in the other, will still be liable before the cargo can be applied in discharge of the bond (*u*).

Freight earned from sub-shippers of cargo, with the consent of the charterers, is liable, as against them, to a bottomry bond granted to secure advances made after the date of the charterparty (*x*).

Freight earned on a voyage subsequent to that for which the bottomry bond was granted, may be made liable to the bond, if the freight earned on the particular voyage has been received by the shipowner without the consent of the bondholder (*y*).

Freight which has been properly paid before the granting of the bottomry bond, or in pursuance of a previous charterparty after the date of the bond, and before the liability to pay it has been intercepted by proceedings on the bond; and insurance premiums on freight, to the deduction of which the shipowner is liable under the charterparty, will not be liable to the bottomry bond (*z*).

An advance of freight by a charterer to the master for necessary expenses, under a charterparty made after a bottomry bond, will be good, in the absence of fraud, as against the bondholder, whose security might have been postponed to a later bond made for the same purpose (*a*); but the bondholder has a claim for such freight against the owner (*b*).

123. The cargo may be bound with the ship and freight, to secure advances for the necessities of the ship and the preser-

(*s*) Atlas, 2 Hag., Ad. 48; Alexander, 1 Dods. 278.

(*t*) Mary Ann, 4 N. of C. 376.

(*u*) Prince Regent, Cit. 2 Rob. 83; Gratitude, 3 Rob. Ad. 240, per Lord Stowell.

(*x*) Eliza, 3 Hag. Ad. 87.

(*y*) Jacob, 4 Rob. Ad. 245.

(*z*) John, 3 W. Rob. 170; 7 N. of C. 61; Standard, Swab. 267; Catherine, Swab. 363.

(*a*) Cynthia, 16 Jur. 749.

(*b*) Id., per Dr. Lushington.

vation and conveyance of the cargo (*d*). But if the bond be limited in terms to the ship, it will not affect the cargo (*e*).

The cargo cannot be bound by bottomry without the ship and freight, the proceeds of which must first be applied in discharge of the bond (*f*); but it seems that a bond which purports to affect the cargo only, may be valid on the assumption that hypothecation of the ship and freight also was intended (*g*).

The master is not the agent for the cargo except by contract or necessity, and he cannot hypothecate it until it is on board ship and under his control; so that a bond made before that event upon ship, freight and cargo, is void as to the cargo. The right is founded upon the necessity of the cargo (*h*), which is measured by the degree of danger and the extent of the advances required (*i*), as compared with the sufficiency of the ship and freight alone to bear such advances (*k*).

The master is not bound to tranship the cargo before raising money on bottomry, although it is in his discretion to do so (*l*).

124. It is essential to a bottomry bond,—

- (1.) That the object of the loan or credit was the obtaining repairs or supplies necessary for the preservation of the ship and cargo, and the prosecution of the voyage (*m*).
- (2.) That the ship was the contemplated security for the loan or credit (*n*).
- (3.) That the maker of the bond had no other credit or means of obtaining the necessary supplies (*o*).

(*d*) *Gratitudine*, 3 C. Rob. 240; *Benson v. Duncan*, 1 Exch. 537.

(*e*) *La Constancia*, 2 W. Rob. 404; 4 N. of C. 285, 512.

(*f*) *La Constancia*, *supra*; *Bona-parte*, 3 W. Rob. 298.

(*g*) *La Constancia*, *supra*.

(*h*) *Jonathan Goodhue*, Swab. 355.

(*i*) *Lord Cochrane*, 2 W. Rob. 320, per Dr. Lushington.

(*k*) *Gratitudine*, 3 Rob. Ad. 240; *Benson v. Duncan*, 1 Exch. 537.

(*l*) *Lord Cochrane*, 8 Jur. 714.

(*m*) *Soares v. Rahn* (Prince of Saxe-Coburg), 3 Moo. P. C. 1; *Gore v. Gardiner* (Hersey), 3 Hag. Ad. 404; 3 Moo. P. C. 79.

(*n*) *Augusta*, 1 Dods. 283; *Wave*, 15 Jur. 518.

(*o*) *Nelson*, 1 Hag. Ad. 169, per Lord Stowell; *Gore v. Gardiner* (Hersey), *supra*; *Dunvegan Castle*, 3 Hag. Ad. 381.

- (4.) That the security of the loan or credit be dependent upon a maritime risk to be ascertained from the contents of the instrument (*p*).

125. (1.) Advances for the following purposes may be secured by bottomry, viz.:—

Repairs, provisions, and other supplies to the ship; and all charges in respect of the ship and crew, which must be paid in order that she may prosecute her voyage, and for which the owner or the master are liable; including port dues and lights, and the unloading of the outward cargo (*q*);

Sea stores for the subsistence of passengers paying passage money in the nature of freight (*r*);

Liabilities incurred through extraordinary peril or misfortune: such as salvage; the investigation at a foreign port of a mutiny, and replacing the master in command; dues and charges of a foreign government incurred while the master was out of possession, and paid, though without his authority, to release the ship; the services of a British consul in taking possession of and managing the affairs of the ship when unprotected (*s*);

The discharge of a prior bottomry bond on the same ship, and for the same voyage (*t*).

The court will not consider whether in the refitting of a ship for sea a little more or less has been done; especially if an improvement necessary for the intended voyage has been sanctioned by the owner (*u*); nor look too narrowly into charges for commission and agency included in the bond (*x*).

(*p*) *Atlas*, 2 Hag. Ad. 48; *Royal Arch*, Swab. 269.

(*q*) *Smith v. Gould* (Prince George), 4 Moo. P. C. 21; *Edmond*, Lush. 57, 211; 30 L. J., Ad. 128.

(*r*) *Duke of Bedford*, 2 Hag. Ad. 294.

(*s*) *Gauntlet*, 3 W. Rob. 82; 6 N. of C. 370; *Zodiac*, 1 Hag. Ad. 320; *Par-meter v. Todhunter*, 1 Camp. 541, per Lord Ellenborough.

(*t*) *Toivo*, 1 Sp. 185.

(*u*) *Royal Arch*, Swab. 269.

(*x*) *Calypso*, 3 Hag. Ad. 162.

126. Advances for the following purposes may not be secured by bottomry:—

The discharge of bottomry or other debts incurred in respect of the same ship on a former voyage (*y*);

Supplies for other ships, though belonging to the same owner (*z*);

Damage sustained by the outward cargo, unless (it seems) it be shown that the consignee had a specific lien on the ship, in respect of which she might have been arrested (*a*);

And generally, liabilities which do not form liens upon, although they were incurred in respect of, the ship: For example,—claims for adjusting general average contribution from the ship; premiums for insurance of ship and freight, or of advance on bottomry; wages paid in advance to the crew in a foreign port; expenses of relanding goods of lender shipped in an unsafe condition; the private debt of the master; debts on the ship bought up by the lender; unliquidated claims on accounts between the parties (*b*).

127. (2.) So far as the loan or any part of it was lent upon personal credit, or to pay for work already done without any stipulation for bottomry, the security will not take effect by way of bottomry, in favour of the person who made the advance (*c*). But a bond for securing money lent for the discharge of debts previously incurred upon personal credit for necessities, may be given to a person who did not supply the necessities (*d*).

(*y*) *Lochiel*, 2 W. Rob. 34; *Osmanli*, 3 id. 198; 7 N. of C. 322; *Toivo*, 1 Sp. 185, per Dr. Lushington.

(*z*) *Osmanli*, *supra*.

(*a*) *Smith v. Gould* (Prince George), 4 Moo. P. C. 21, per Lord Campbell; *Edmond*, Lush. 57.

(*b*) *North Star*, Lush. 45; *Scrafina*, B. & L. 277; *Boddingtons*, 2 Hag. Ad. 422; *Royal Stuart*, 2 Sp. 258; *Yates v.*

Hall, 1 T. R. 73, per Buller, J.; *Ocean*, 2 W. Rob. 429; 4 N. of C. 410; *Cognac* 2 Hag. Ad. 385; *Ida*, L. R., 3 Ad. 542.

(*c*) *Augusta*, 1 Dods. 283; *Gore v. Gardiner* (Hersey), 3 Moo. P. C. 79; *Beldon v. Campbell*, 6 Ex. 886.

(*d*) *Hebe*, 2 W. Rob. 412; 4 N. of C. 361; *Karnak*, L. R., 2 Ad. 289; *Id.*, 2 P. C. 505; 6 Moo. P. C., N. S. 136.

If the loan was not made on personal credit, and it can be inferred from the circumstances that the lender looked to the security of the ship, the security may take effect by way of bottomry, though the advance was made, or the responsibility incurred, without an express agreement for bottomry (*e*).

If the loan was clearly made upon personal credit, the right of the lender to a lien upon the ship by the law of the country in which the bond was granted, or even the arrest or threatened arrest of the ship or the master, will not alone give validity to a subsequent bottomry bond for the same debt, but ought to be considered in combination with other circumstances in judging of the validity of the bond; and if there be no proof that the loan was made upon personal credit, the presumption that it was made upon the credit of the ship is favoured by the existence of a lien (*f*).

If it be proved that the foreign law gave a lien upon the ship for damage to the cargo in the voyage in which the ship was then engaged, or for any other demand for which the owner would be liable, and that the master had no fund from which it could be made good, he may hypothecate the ship to prevent its arrest and sale (*g*).

If the general character of the transaction be clearly of the nature of bottomry, the whole will be presumed to be of the same character, unless the contrary be proved. And particular advances of small amount made for the necessary service of the ship, or for the payment of debts incurred for such service, before the bond was specially mentioned, may be included in the bond (*h*).

If the loan be made upon the sole security of the bottomry bond, the bond will not be invalid because bills of exchange for the amount due were given at the same time, even though

(*e*) Alexander, 1 Dods. 278; Vibilia, 1 W. Rob. 1; Laurel, B. & L. 317.

(*f*) Augusta, 1 Dods. 283; Vibilia, 1 W. Rob. 1; Gore v. Gardiner (Hershey), 3 Hag. Ad. 404; 3 Moo. P. C. 79; Royal Arch, Swab. 269; Laurel, B. & L. 191, per Dr. Lushington; Karnak,

L. R. 2 Ad. 289; id., 2 P. C. 505; 6 Moo. P. C., N. S. 136.

(*g*) Smith v. Gould (Prince George), 4 Moo. P. C. 21, per Lord Campbell.

(*h*) Vibilia, 1 W. Rob. 1; Trident, id. 29; Hebe, 2 id. 412; 4 N. of C. 361; Smith v. Gould (Prince George), 4 Moo. P. C. 21.

it be stated that the bond was a collateral security for the bills (*i*).

Such bills are commonly given in practice, and though called collateral securities, they are only given as additional and more negotiable securities, and do not affect the nature of the original bottomry transaction (*k*).

If the bill of exchange be given before the bottomry bond, or if it form the only written contract, it is evidence that no security was intended to be given upon the ship (*l*).

128. (3.) One who, being indebted to the ship or her owners, lends money on bottomry can have the benefit of the security for so much only of the loan as exceeds his debt, because to the extent of the debt the borrower was not without resources (*m*). And if the master borrow on bottomry without reckoning such resources as he may have at the port, or for purposes which may not, as well as for those which may, be supplied by bottomry, the amount properly chargeable on the bond will be ascertained by inquiry (*n*).

129. (4.) The bottomry bond is commonly made payable upon or within a short time after the arrival of the ship at her destination (*o*), and it must express or imply that the loan is risked upon the arrival of the ship (*p*).

The particular voyage upon which the risk is incurred ought to be stated in the bond as precisely as circumstances will admit; and the bond will not be discharged if the voyage be abandoned (*q*), or by a loss happening in the course of an unnecessary deviation (*r*). But it will not be invalid for want

(*i*) *Tartar*, 1 Hag. Ad. 1; *Nelson*, id. 169; *Jane*, 1 Dods. 461; *Emancipation*, 1 W. Rob. 124.

(*k*) *Nelson*, 1 Hag. Ad. 169, per Lord Stowell; *Ariadne*, 1 W. Rob. 411; 1 N. of C. 494, per Dr. Lushington.

(*l*) *Augusta*, 1 Dods. 283; *Stainbank v. Shepard*, 17 Jur. 1032, per Parke, B.; *Halkett, Exp.*, 19 Ves. 474.

(*m*) *Hebe*, 2 W. Rob. 146—412.

(*n*) *Dobson v. Lyall*, 2 Ph. 323 n.; *Hcart of Oak*, 1 W. Rob. 204; *Smith v.*

Gould, 4 Moo. P. C. 21.

(*o*) *Duke of Bedford*, 2 Hag. Ad. 294; *North Star*, Lush. 45.

(*p*) *Nelson*, 1 Hag. Ad. 169; *Atlas*, 2 id. 48; *Stainbank v. Fenning*, 11 C. B. 51; 15 Jur. 1082; *Stainbank v. Shepard*, 18 C. B. 418; 17 Jur. 1032; *Mary Ann*, L. R., 1 Ad. 18, per Dr. Lushington; *Smith v. Bank of N. S. Wales*, L. R., 4 P. C. 194.

(*q*) *Helgoland*, Swab. 491.

(*r*) 1 Eq. Ca. Abr. 372.

of an exact description of the voyage, if, as in the case of a government transport, the voyage be not under the control of the person who grants the bond (*s*).

The words "port of destination" include any port at which the voyage may be ended, although it be by the voluntary act of the master, if he acted properly in ending it (*t*).

130. An intention to incur maritime risk may be implied:—

By a provision that the money shall be paid at such a time after the arrival of the ship at her port (*u*); or "after my arrival" (meaning, with the ship) (*x*); or by the use of the word bottomry (*y*).

But not by the use of the word "hypothecate;" or by the reservation of a rate of interest not exceeding the current rate at the place in which the loan was made (*z*).

If the lender take upon himself the risk of part only of the voyage, and the voyage be divisible, the loan may be held to have been made upon that part only of the voyage upon which the risk was taken (*a*).

If maritime risk be apparent in the bond it will be valid, although maritime interest or premium (which is given only as compensation for maritime risk) be not reserved (*b*). But where the character of the instrument is doubtful, it is a material circumstance that only ordinary interest was reserved (*c*).

If the amount of the maritime interest be not inserted in the bond, it will not be supplied by the court upon evidence that the rate agreed upon was omitted by mistake; but the rate of interest usual at the time and place of the execution of the contract will be allowed, when it has been ascertained by the Registrar and merchants (*d*).

(*s*) *Jane*, 1 Dods. Ad. 461.

(*t*) *Great Pacific*, L. R., 2 Ad. 381;
2 P. C. 516.

(*u*) *Nelson*, 1 Hag. Ad. 169.

(*x*) *Simonds v. Hodgson*, 3 B. & Ad. 50.

(*y*) *Royal Arch*, Swab. 269, per Dr. Lushington.

(*z*) *Emancipation*, 1 W. Rob. 124.

(*a*) *Hero*, 2 Dods. 139.

(*b*) *Boddingtons*, 2 Hag. Ad. 422,
per Sir C. Robinson; *Laurel*, B. & L.
319.

(*c*) *Emancipation*, 1 W. Rob. 124;
Royal Arch, Swab. 269.

(*d*) *Change*, Swab. 240.

If the rate of maritime interest reserved be so exorbitant as to be contrary to good faith, it will be reduced to such a rate as shall be thought sufficient by the Registrar and merchants (*f*); but the court will not pronounce against the bond on account of the largeness of the premium or commissions, unless they are so large as to be fraudulent (*g*).

If a substantial part only of the risk has been incurred, the whole maritime interest incurred may yet be allowed. But if no part of the risk has been incurred, relief will be given against the bond upon payment of the principal with ordinary interest (*h*).

131. A bottomry bond may be granted either by the owner, being, or not being also, the master of the ship, or by the master (*i*). If the owner of a ship, who is also the master, grants a bottomry bond, he grants it as owner only; the character of master being absorbed in the ownership (*k*); but if he be only part owner and master, he has no more power as against the other part owners than a mere master (*l*).

The owner of a ship, who is not also the master, may grant a bottomry bond without the concurrence of the master (*m*); but he can only hypothecate for necessary supplies to the ship, and in a foreign port (*n*).

132. The power of the master to raise money upon bottomry, rests, both as to the ship and the cargo, upon the necessity of acting by an agent where no contract can be made by the owner; and of obtaining supplies for the ship which cannot be had upon other terms, and it can be used only for the benefit of

(*f*) *Zodiac*, 1 Hag. Ad. 320; *Cognac*, 2 id. 377; *Royal Arch*, Swab. 269, per Dr. Lushington; *Huntly*, Lush. 24; *Lord Cochrane*, 8 Jur. 714; *Laurel*, 11 Jur., N. S. 46.

(*g*) *Dante*, 2 W. Rob. 427; 4 N. of C. 408.

(*h*) *De Guilder v. Depeister*, 1 Vern. 263; *Aline*, 1 W. Rob. 111, per Dr. Lushington; *Dante*, supra.

(*i*) *Barbara*, 4 Rob. Ad. 1; *Duke of Bedford*, 2 Hag. Ad. 294; *Helgoland*, Swab. 491.

(*k*) *Duke of Bedford*, supra, per Sir C. Robinson.

(*l*) *Orelia*, 3 Hag. Ad. 75.

(*m*) *Duke of Bedford*, supra; *Barbara*, supra.

(*n*) *Royal Arch*, Swab., per Dr. Lushington; *Helgoland*, id. 491.

the ship and cargo (*o*). If the master execute a bottomry bond, being at the time under arrest at the suit of the lender, it will be valid as to advances received at the time of executing the bond; and as to former advances, it will not be void by reason of the imprisonment of the master, unless it were given under absolute duress (*p*). But a bottomry bond cannot be supported on the mere ground that the master was arrested, or liable to arrest for the debt (*q*).

133. The master may grant a bottomry bond so long as he remains in the visible exercise of his command (*r*). And upon the death, permanent absence, or incapacity of the original master, the power vests in the master who succeeds, or who has been substituted in the office by the person who takes charge of the ship (*s*).

The master by succession includes an inferior officer; one of the original crew remaining upon the recapture of a ship (*t*); the purser, factor, or other person who at the time represents the owner (*u*); the British consul, though he has appointed a new master, who (without objecting) has not executed the bond (*x*).

The master by substitution may be a master appointed by the British consul (*y*); or the agents or consignees of the ship or of the cargo where recognized by the owner, or perhaps if not so recognized (*z*); and though the underwriters intervene in the appointment after notice of abandonment by the owner (*a*).

134. The master must obtain the consent of the owner before granting a bottomry bond upon the ship and freight, if it be

(*o*) *Brixton v. Snee*, 1 Ves. 154, per Lord Hardwicke; *Hussey v. Christie*, 13 Ves. 598, per Lord Eldon; *Duranty v. Hart*, 2 Moo. P. C., N. S. 289. As to the meaning of the word "necessity" see *Karnak, L. R.*, 2 P. C. 508; 6 Moo. P. C., N. S. 186.

(*p*) *Heart of Oak*, 1 W. Rob. 204.

(*q*) *Smith v. Gould* (Prince George) 4 Moo. P. C. 21.

(*r*) *Jane*, 1 Dods. Ad. 461.

(*s*) *Zodiac*, 1 Hag. Ad. 320; *Alex-*

ander, 1 Dods. 278; *Rubicon*, 3 Hag. Ad. 9.

(*t*) *Farmeter v. Todhunter*, 1 Camp. 541, per Lord Ellenborough.

(*u*) *Scarborough v. Lyrus, Latch*, 252, per Dodderidge, J.

(*x*) *Cynthia*, 16 Jur. 748.

(*y*) *Zodiac*, 1 Hag. Ad. 320.

(*z*) *Wakefield*, cit. 3 Hag. Ad. 8; *Alexander*, 1 Dods. 278, per Lord Stowell.

(*a*) *Kennerley Castle*, 3 Hag. Ad. 1.

reasonably practicable to communicate with him; but he is not bound to await an answer from the owner before engaging for a loan on bottomry, if, under the circumstances, the consequent delay would endanger the safety of the ship and cargo (*b*).

The duty of the master in making or omitting such communications to the owner depends upon the practicability of communication with him, and not upon the circumstance that they are or are not in the same country (*c*).

Notice must be given to the owner notwithstanding his alleged insolvency, unless the insolvency be judicially declared; in which case notice must be given to those who succeed to his property (*d*).

135. If it be intended to include the cargo in the bottomry bond, the same general rule applies as to obtaining the consent of the owners, shippers, or consignees of the cargo (*e*). But the number of owners of the cargo, the position of the ship with regard to them, and to the means of communication, the perishable nature of the cargo and its relative value to that of the ship, are circumstances which must be considered in each case, and which prevent the laying down of any absolute rule upon the subject (*f*).

It is not necessary to give special notice of the intended bottomry to the shipper of the cargo, if being on the spot, and cognizant of the intended bottomry, he does not interfere (*g*).

136. The consent of the managing owner of the ship to the bottomry bond will bind his co-owners (*h*), and the consent of the principal owners of the cargo will bind the other owners (*i*).

(*b*) *Wallace v. Fielden* (Oriental), 7 Moo. P. C. 398; *Royal Arch*, Swab. 269, per Dr. Lushington; *Olivier, Lush.* 484; and see *Australasian, &c. Co. v. Morse*, L. R., 4 P. C. 222.

(*c*) *Wallace v. Fielden* (Oriental), 7 Moo. P. C. 398; 3 W. Rob. 243; *La Ysabel*, 1 Dods. 273; *Trident*, 1 W. Rob. 29; see *Johns v. Simons*, 2 Q. B. 425.

(*d*) *Barron v. Stewart* (Panama), L. R., 3 P. C. 199.

(*e*) *Wilkinson v. Wilkinson* (Bona-parte), 8 Moo. P. C. 459; 3 W. Rob. 298; *Olivier, Lush.* 484; *Hamburg, B. & L.* 253; 2 Moo. P. C., N. S. 289; *Onward*, L. R., 4 A. & E. 38.

(*f*) *Duranty v. Hart* (Hamburg Cargo, ex.), 2 Moo. P. C., N. S. 289.

(*g*) *Lord Cochrane*, 2 W. Rob. 320; 3 N. of C. 172; but see *Nuova Loanesse*, 17 Jur. 263, contra.

(*h*) *Royal Arch*, Swab. 269.

(*i*) *Rhadamanthe*, 1 Dods. 201.

137. It is proper, but not absolutely necessary, that the master, before raising money on bottomry, should advertise his intention to do so (*h*).

138. The master may, subject to the rule as to communication with the owner, grant a bottomry bond:—

In a foreign port for the completion of the voyage in which the ship is engaged (*l*); or for the return voyage (*m*).

For a new voyage from a foreign port with the consent of the owner, but not without such consent (*n*).

In a home port, if no communication can be had with the owner, for the completion of the voyage (*o*); but not, even with the consent of the owner, for a new voyage: lest a secret lien should be effected without necessity, and against the policy of the statute law, that all incumbrances should appear on the ship's papers (*p*).

In relation to the rights and remedies of persons having claims for repairs done to or supplies furnished to or for ships, every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed a home port (*q*).

139. A bottomry bond may be valid whatever be the number of voyages included in the adventure, provided such voyages were in the contemplation (expressed or to be inferred) of the owner. Intermediate voyages, which under the circumstances the master is considered to be justified in making, will be

(*h*) Laurel, B. & L. 319, per Dr. Lushington.

(*l*) See *Vibilia*, 1 W. Rob. 1; *Lloyd v. Guibert*, L. R., 1 Q. B. 115.

(*m*) See *Nelson*, 1 Hag. Ad. 169.

(*n*) *Royal Arch*, Swab. 269, per Dr. Lushington; *Lister v. Baxter*, Str. 695.

(*o*) *La Ysabel*, 1 Dods. 273; *Trident*,

1 W. Rob. 29; *Lochiel*, 2 id. 34; 2 N. of C. 177, per Dr. Lushington.

(*p*) *Johnson v. Shippen*, 2 Ld. Raym. 982; *Royal Arch*, Swab. 269; see *Jenny*, 2 W. Rob. 5.

(*q*) *Mercantile Law Amendment Act*, 1856, 19 & 20 Vict. c. 97, s. 8. For Scotland, id., c. 60, s. 18.

treated as grafts upon the original enterprise (*r*). The bond will be enforced if the master fraudulently neglect or refuse to complete the voyage, or if the voyage having been begun remain incomplete from circumstances beyond the bondholder's control (*s*).

140. A bottomry bond will not be invalid by reason that the voyage was made in fraud of a mortgagee, or of the Ship Registry Act (*t*), the lender being without notice (*r*). And, except in cases of fraud, the right of the master to make a second bottomry bond will not be interfered with, although the effect will be to injure the first bondholder (*u*).

141. The master cannot bind any owner of the ship or cargo other than himself to the lender on bottomry personally, but only to the extent of the property comprised in the bond; and the bond will be rejected, so far as it affects to bind the owner personally (*v*). But if the bond include the cargo, the shipowner, whether the cargo be made liable by the same or by different instruments, will be bound personally to refund to the owner of the cargo, so much as he may have been obliged to pay of the shipowner's debt, by reason of the insufficiency of the ship and freight; and the shipowner cannot relieve himself from this liability by abandoning the ship (*x*).

The power of the master to bind the shipowner, in respect of the ship or cargo, is subject to the law of the ship's flag, when in the case of a foreign flag, the law has been proved in evidence; otherwise the law of England will be applied. The flag of the ship is notice that the master's authority is conferred by the law of the country to which he belongs (*y*).

(*r*) *Mary Ann*, 4 N. of C. 376; 10 Jur. 253. See *Reliance*, 3 Hag. Ad. 66.

(*s*) *Armadillo*, 1 W. Rob. 251; *Dante*, 2 id. 427.

(*t*) *Mary Ann*, L. R., 1 Ad. 13.

(*u*) *Armadillo*, 1 W. Rob. 251.

(*v*) *Tartar*, 1 Hag. A. R. 1; *Nelson*, id. 169; *Nostra Senora del Carmine*, 1 Sp. 303; 18 Jur. 780.

(*x*) *Benson v. Duncan*, 3 Exch. 644; 1 id. 537.

(*y*) *Lloyd v. Guibert*, 6 B. & S. 100; L. R., 1 Q. B. 115; 10 Jur., N. S. 948; *Karnak*, L. R., 2 P. C. 505. In France it is said the shipowner may relieve himself from the consequences of the master's engagement by abandoning the ship and freight.

142. In the absence of express contract, the master is not personally liable on the bottomry bond. It is usual for the master to bind himself expressly; but his liability is commonly treated as nominal, though it may be enforced, and in questions of priority is treated as a subsisting liability (*z*).

143. The agent or consignee of the ship or cargo cannot generally take a bottomry bond to secure disbursements which he has made as agent (*a*); but he may do so upon the failure or insufficiency of the credit upon which he relied, if he give prompt notice of the necessity under which the disbursements were made (*b*); and, whether he be the agent of the owner or of the mortgagee, he may lend on bottomry, if he give notice to the master of his refusal to lend upon personal credit (*c*).

144. One who lends or makes himself responsible for money expended for the use of a ship, intending to require a bottomry bond, ought, if he has an opportunity, to give notice of his intention to the master or owner at the earliest possible period (*d*).

He must also use reasonable diligence in ascertaining that the loan is necessary; that it can be obtained only by bottomry; and that such communications as under the circumstances are practicable have been made to the owners and consignees of the ship and cargo (*e*).

The lender will not be discharged from the duty of making these inquiries by the circumstance that the master has sold the bottomry loan by auction to the lowest bidder, after advertising his intention to do so (*f*).

If the lender have made proper inquiries the bottomry bond will be valid, though it be shown that the supplies were not

(*z*) Jonathan Goodhue, Swab. 524; Salacia, Lush. 545.

(*a*) Gratitude, 3 Rob. Ad. 240; Hero, 2 Dods. 139, per Lord Stowell; Minstrel Boy, 7 N. of C. 341.

(*b*) Rubicon, 3 Hag. Ad. 9; Hero, *supra*, per Lord Stowell.

(*c*) Vibilia, 1 W. Rob. 1; Lord Cochran, 2 id. 320; 3 N. of C. 172; Hero, *supra*; Royal Arch, Swab. 279, per Dr.

Lushington; Smith v. Bank of N. S. Wales, L. R., 4 P. C. 194.

(*d*) Wave, 15 Jur. 518.

(*e*) Orelia, 3 Hag. Ad. 75; Roderick Dhu, Swab. 177; Heathorn v. Darling (Eliza), 1 Moo. P. C. 5; Olivier, Lush. 484.

(*f*) Soares v. Rahn (Prince of Saxe Coburg), 3 Hag. Ad. 387; 3 Moo. P. C. 1.

necessary, or that they might have been had upon personal credit. But it will, of course, be void if he had notice from the owners' agent not to make the advance (*g*).

If the lender have made proper inquiries, and fraud be not shown, he will not be liable to see to the due application of the loan (*h*); but if he is agent it is his duty also to see to the due application of the loan (*i*).

145. The lender on bottomry is not bound to judge as to the expediency of the proposed repairs to the ship, with reference to the value of the property, unless under the circumstances fraud can be imputed (*h*); or to communicate the existence of the bond to mortgagees of the ship; and he is not affected although the owners conceal it from the mortgagees (*l*).

146. Respondentia is the separate hypothecation of the cargo of a ship as a security for the repayment of a debt contracted about the necessary costs of transshipping and forwarding the cargo to its destination (*m*).

Respondentia and bottomry are founded upon the same necessity of borrowing money for the preservation of the property. They are alike subject to the rules respecting maritime risk and interest, and the rejection of void stipulations (*n*).

(*g*) *Nelson*, 1 Hag. Ad. 169, per Lord Stowell; *Faithful*, 31 L. J., Ad. 81; *Soares v. Rahn*, supra, per Dr. Lushington.

(*h*) *Jane*, 1 Dods. 461, per Lord Stowell; *Roderick Dhu*, Swab. 177, per Dr. Lushington.

(*i*) *Royal Stuart*, 2 Sp. 261, per Dr. Lushington. Compare the above rules with those laid down by the Privy Council as to the rights, under the Hindoo law, of an incumbrancer who has taken from the manager of the estate of an infant heir a charge upon it created for the salvage or benefit of the estate. The lender is bound to inquire into the necessity for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager

is acting for the benefit of the estate. If he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances he is not bound to see to the application of the money. (*Hunoomanpersand Panday v. Mussumat Babooes Munraj Koonweree*, 6 Moo. I. App. 393.)

(*k*) *Vibilia*, 1 W. Rob. 1; *Duncan v. Benson*, 1 Exch. 537, per Pollock, C. B.

(*l*) *Helgoland*, Swab. 491; but see *Panama*, L. R., 2 Ad. 390.

(*m*) *Atlas*, 2 Hag. Ad. 48, per Lord Stowell; *Cargo ex Sultan*, Swab. 504. See *Cargo ex Galam*, B. & L. 167.

(*n*) *Cognac*, 2 Hag. Ad. 377, per Sir C. Robinson; *Cargo ex Sultan*, Swab. 504, per Dr. Lushington.

147. Notice should be given to the owners of the cargo before it is hypothecated on *respondentia*; but want of notice will not invalidate the bond if the owners are so numerous and remote, that the expense and hazard of keeping the cargo pending the communication, would probably be equivalent to its loss (*o*).

148. The effect of the contract depends upon the particular form of the instrument; and notwithstanding a recital that the loan was on the goods laden or to be laden on board the ship, the borrower only will be personally liable to answer the contract if it appears that the goods were such as in the course of the adventure must necessarily be sold or exchanged, or if the effect of the recital be restrained by the context (*p*) (**141**).

(*o*) *Cargo ex Sultan, supra*; and see *Australasian Co. v. Morse*, L. R., 4 P. C. 223.

(*p*) 2 Steph. Blackst. 94, ed. 6; *Busk v. Fearon*, 4 East, 319. But the form

of the bond, upon which this decision was made, is nearly the same as that stated by Weskett to be the form used in London in 1781. (*Digest of Law of Insurance*, 60.)

CHAPTER II.

OF LIENS.

PART 1.—OF NON-POSSESSORY LIENS.

(A.) JUDICIAL LIENS.

(B.) EQUITABLE LIENS.

PART 2.—OF POSSESSORY LIENS, AND HEREIN OF GENERAL AND SPECIFIC LIENS.

PART 1. (A.)

149. *Of Liens.*

151. *Of Judicial Liens.*

157. *Of Voluntary Judgments.*

167. *Of Charging Orders.*

172. *Of Judgments and Orders for Payment of Money.*

180. *Of the Registration of Judicial Liens.*

149. A LIEN is an obligation which by implication of law, and not by express contract, binds real or personal estate for the discharge of a debt or engagement; but does not pass the property in the subject of the lien (*a*).

An express contract for a lien excludes such a lien, as, but for the contract, might have arisen by force of law (*b*).

150. Liens are NON-POSSESSORY or POSSESSORY.

Non-possessory liens bind the real or personal property of the debtor, and do not depend upon possession of it by the debtor. They are either *judicial* or *equitable* (**9, 192**).

Judicial liens arise by the judgments and orders of courts of justice.

(*a*) *Wilson v. Heather*, 5 Taunt. 642, per Gibbs, C. J.; *Gladstone v. Birley*, 2 Mer. 401, per Sir W. Grant; *Leith's Estate*, Re (*Chambers v. Davidson*), L. R., 1 P. C. 296, per Lord Westbury.

(*b*) *Walker v. Birch*, 6 T. R. 258,

per Lord Kenyon; *Stevenson v. Blake-lock*, 1 M. & S. 535, per Lord Ellenborough; *Leith's Estate*, Re, *supra*, per Lord Westbury. *M'Kenna, Exp.* (City Bank Case), 3 De G. F. & J. 629.

Of Judicial Liens.

151. A judgment debt is a debt which, having been established by the judgment of some one of certain courts of justice (172) or by the acknowledgment of the debtor, may be enforced by execution against the real and personal estate of the latter. The creditor, by virtue of a judgment, acquires a fixed right against the property of his debtor, which can only be discharged by release or satisfaction, and cannot be defeated by the act of the owner of the estate.

152. By virtue of the statute 13 Edward 1 (Westminster 2nd), c. 18, which extended the remedies of judgment creditors, a judgment became a general charge upon all lands within the act which the debtor had at the time of entering up the judgment, and which he subsequently acquired; but, his right to execution at law being limited by the statute to one moiety of the land, his remedy in equity, where legal execution could not be had, was similarly restrained.

Copyholds and several other species of realty were not included in the act, and leaseholds and other chattels were not affected until execution sued out. As to freeholds, it was said to be necessary for the creditor to sue out his *elegit* (c) before he could make his charge available in equity, where no assistance was given until the applicant had done his best to complete his title at law (d).

(c) When debt is recovered or known in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of fieri facias unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one half of his land, until the debt be levied upon a reasonable price or extent; and if he be put out of that tenement he shall recover by writ of novel disseisin, &c. (Stat. Westminster 2nd, 13 Edw. 1, st. 1, c. 18.) Hence the writ of execution against land is called an

elegit. When the sheriff has issued the first writ of *elegit*, there is no interest left in the debtor which amounts to a *tenement* within this statute, or which the law recognizes as an estate or interest capable of being taken under a second writ. (Carter v. Hughes, 2 II. & N. 714, per Martin, B.) Tenants by statute merchant, by statute staple, and by *elegit*, have incertain interests in lands or tenements, and yet they have but chattels and no freehold; whose estates are created by divers acts of parliament. (1st Inst. 42 a).

(d) Neate v. Duke of Marlborough, 3 My. & C. 407; Mitf. Pl. 149, ed. 5.

By the 10th section of the Statute of Frauds, the sheriff was empowered to deliver execution to the judgment creditor of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person might be seised of in trust for the judgment debtor, as if the latter had himself been seised of such estate as the trustee was seised of in trust for him at the time of the execution sued; the hereditaments to be held by virtue of the execution free from incumbrances by the trustee. But this statute did not include the equity of redemption, or other equitable interest in a term of years (*e*), or the equity of redemption in freeholds; being only applicable where the debtor had the whole beneficial interest (*f*). And the words "at the time of the execution sued" referred to the seisin of the trustee; so that, though the legal estate was bound from the time of signing the judgment, such trust property only as the trustee was possessed of at the time of the execution sued was affected; and if he conveyed before execution the land could not be taken (*g*).

By the statute 1 & 2 Vict. c. 110 (*h*) (766), judgment creditors, whose rights under the former law were limited to a moiety of particular descriptions only of the debtor's property, and who had only a general charge upon such property, acquired a specific charge (*i*) upon all such lands, tenements, rectories, advowsons, tithes, rents and hereditaments, including copyhold or customary lands, of or to which the person against whom judgment is entered up should at the time of the entering up thereof, or at any time after, be seised, possessed or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person should at the time of entering up the

(*e*) *Lyster v. Dolland*, 1 Ves. J. 431; *Scott v. Scholey*, 8 East, 467. But an equity of redemption might be taken and sold by the crown under an extent. (*The King v. De la Motte*, For. 162.)

(*f*) *Forth v. Duke of Norfolk*, 4 Mad. 503.

(*g*) *Harris v. Pugh*, 4 Bing. 335; 12 Moo. 577.

(*h*) Sect. 13.

(*i*) As to the nature of the statutory charge, see 1 Dr. & War. 195; *Boyle, Exp.*, 17 Jur. 981, where the judgment creditor was said to be in the position of an equitable mortgagee. It cannot however be said that he lent his money on the faith of the land. And see *Benham v. Keane*, 1 J. & H. 698; 3 De G., F. & J. 334; 8 Jur., N. S. 604.

judgment, or at any time after have any absolute disposing power; and the judgment was made binding against the judgment debtor, and all persons claiming under him after such judgment, and the issue of his body, and all persons whom he was absolutely entitled to bar. But no judgment creditor was to be entitled to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the entering up of his judgment. And no preference was to be gained in respect of a judgment charge, in case of the bankruptcy of the judgment debtor, unless the judgment had been entered up at least a year before the bankruptcy.

This period of one year was only applicable (*k*) to the entering up, and not to the registration of the judgment, so that a charge might be enforced after a lapse of a year from the entering up, although the judgment might have been registered since that period.

153. The operation of judgments against purchasers and mortgagees has however been restricted by several more recent statutes. The first of these, the object of which was to avoid the delay and expense in consequence of judgments against mortgagees and crown debts, and liabilities to the crown of mortgagees, continuing to bind lands, although the mortgagees had been *bonâ fide* paid off, and the lands conveyed to purchasers or other mortgagees, provides (*l*), that where any legal or equitable estate or interest, or any disposing power in or over any lands, tenements or hereditaments, shall, under any conveyance or other instrument executed after the passing of the act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments shall not be taken in execution under any *elegit* or other writ of execution upon any judgment, decree, order or rule against any mortgagee or mortgagees thereof who shall have been paid off prior to or at the time of the execution of such conveyance; nor shall any such judgment, &c., or the money thereby secured, be a charge upon such

(*k*) *Derbyshire and Staffordshire Rail. Co. v. Bainbrigge*, 15 Beav. 146; and see *Boyle, Exp.*, 17 Jur. 979; 3 De G., M. & G. 515.

(*l*) 18 & 19 Vict. c. 15, s. 11.

lands, tenements or hereditaments so vested in purchasers or mortgagees, nor shall such lands, &c., so vested be extended or taken in execution, or rendered liable by or on behalf of the crown in respect of any liability by any mortgagee or mortgagees, whereby he or they hath or have or shall become a debtor or accountant or debtors or accountants to the crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid. The purchaser, therefore, of property subject to a mortgage, which is intended to be paid off out of the purchase-money, cannot object to complete on the ground that judgments or crown debts are entered up against the mortgagee (*m*).

154. By another statute (*n*), which recites that it is desirable to place freehold, copyhold and customary estates on the same footing with leasehold estates, in respect of judgments, statutes and recognizances, as against purchasers and mortgagees (but which does not appear otherwise to affect the operation of judgments), and also to enable purchasers and mortgagees of estates to ascertain when execution has issued on any judgment, statute or recognizance, and to protect them against delay in the execution of the writ, it is enacted that no judgment, statute or recognizance (the word judgment being declared (*o*) to include registered decrees, orders of courts of equity and bankruptcy and other orders having the operation of a judgment (172)), to be entered up after the passing of the act (23 July, 1860), shall affect any land of whatever tenure as to a *bond fide* purchaser for valuable consideration, or a mortgagee, whether with or without notice of any such judgment, statute or recognizance, unless a writ or other due process of execution of such judg-

(*m*) *Greaves v. Wilson*, 25 Beav. 434; 4 Jur., N. S. 802.

(*n*) 23 & 24 Vict. c. 38, s. 1.

(*o*) Sect. 5. Neither in this nor in the statute next cited is there any definition of a recognizance. But as the recognizance mentioned in the statutes must have been registered under the judgment acts, it seems clear that the common law recognizance (157)

only is intended, and not that which, upon various occasions, is entered into by persons who give security to the court, and which it is understood is never registered, though it is enrolled according to the practice of the court. (See Lord Bacon's Orders in Chancery, 16 Jac. 1, No. 92; XLII. Cons. Ord. V.)

ment, statute or recognizance shall have been issued and registered as thereafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: Provided that no judgment, statute or recognizance to be entered up after the passing of the act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

155. And by a yet later statute (*p*), which recites that it is desirable to assimilate the law affecting freehold, copyhold and leasehold estates to that which affects pure personal estates, in respect of future judgments, statutes and recognizances, it is declared, that no judgment (which also includes (*q*) registered decrees, orders of courts of equity and bankruptcy and other orders having the operation of a judgment), statute or recognizance, to be entered up after the passing of the act (29th July, 1864), shall affect any land (including corporeal or incorporeal hereditaments, or any interest therein) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, statute or recognizance.

156. Under this last act a judgment will not be a charge upon the land until the judgment creditor has issued execution and the sheriff has made his return (*r*). But where the judgment creditor has issued execution he will be protected, even under 27 & 28 Vict. c. 112, although he cannot literally comply with the requirement of the act, that the land shall have been delivered in execution (*s*) (**838**).

(*p*) 27 & 28 Vict. c. 112, s. 1.

(*q*) Sect. 2.

(*r*) *Guest v. Cowbridge Rail. Co.*,
L. R., 6 Eq. 619.

(*s*) *Thornton v. Finch*, 4 Gif. 515;
and see *Guest v. Cowbridge Rail. Co.*,
supra.

Of Voluntary Judgments.

157. Voluntary judgments (which for many centuries (*t*) it has been the practice to confess and enter up in pursuance of contracts between debtors and creditors), are entered up under a warrant of attorney to confess judgment in a future action or

(*t*) "When debt is recovered or *known* in the king's court" (St. Westm. 2, c. 18, 13 Edw. 1, A.D. 1285). Besides the recognizance at common law, which was an obligation acknowledged by the purchaser in a court of record or before a judge, master in chancery or justice of the peace, and upon which execution might be sued out as on a judgment actually recovered in a suit, it will be proper to mention here several other ancient forms of security, in the nature of voluntary judgments, which have now fallen into disuse. The first, called the *statute merchant*, was provided by the Statute of Acton Burnell (11 Edw. 1), and was regulated by 13 Edw. 1, st. 3, c. 1. It was an acknowledgment by the debtor of a merchant, of the debt and the day of payment before the mayor of London or chief warden of a city or town or other persons appointed by the king, and evidenced by a recognizance enrolled with an obligation sealed with the seals of the debtor and of the king, and enforceable, in the case of non-payment, by imprisonment of the body of the debtor, if he were lay, by such mayor or warden, if he were within their jurisdiction, and if not, then by writ out of Chancery directed to the sheriff. During the first quarter of a year of his imprisonment the debtor had the opportunity of paying the debt out of his own goods and chattels, which were delivered to him for that purpose; if he refused, his lands and goods were delivered to the merchant by a reasonable extent till the debt should be levied, the debtor meanwhile remaining in prison. If the debtor could not be found, or were a clerk, the

merchant had delivery of all his goods and lands and a writ to take his body, if he were lay, with liberty to the debtor to sell the property after delivery to the merchant, so that he had no damage, and allowing his costs and expenses. If the debtor or his sureties died, the land might be taken, but not the body of the heir.

The *statute staple*, founded upon 27 Edw. 3, st. 2, was a recognizance acknowledged before the mayor and one of the two constables and sealed with the seal of the staple, by virtue of which the mayor might take the body of the debtor and commit him to prison, if found within the staple, till he made agreement for the debt and damages, and might seize and deliver to the creditor or sell the goods of the debtor within the staple; and if the debtor, or goods to the amount of the debt, were not within the staple, execution might issue out of Chancery against the body, lands and goods of the debtor, as in the case of a *statute merchant*.

There was also, under 23 Hen. 8, c. 6, a recognizance, in the nature of a *statute staple*, sometimes called a *statute staple improper* (Cowell), by which the like remedies as might be had upon an ordinary *statute staple* were given to ordinary creditors, the bond or recognizance being acknowledged before the chief justice of the King's Bench or Common Pleas, and in their absence out of term before the mayor of the staple of Westminster and the recorder of London jointly; the recognizance being sealed with the seal of the debtor of the king and of the judge or person before whom it was taken. *Statutes merchant and statutes staple* were di-

under a *cognovit actionem*, which is an acknowledgment of a demand, for the recovery of which a suit has actually been commenced. The condition of a warrant of attorney, that on non-payment at a certain day execution may issue is not a contract, but a description of the object of the security, and of the means by which, in case of default, the creditor may enforce payment (*u*). The proper mode of recovering debts so secured is by entering up judgment in pursuance thereof, and not by action on an implied contract to pay the debt (*x*). Although

rected to be inrolled by 27 Eliz. c. 4, ss. 7, 8; 29 Car. 2, c. 3, s. 18 (Statute of Frauds), and 8 Geo. 1, c. 25.

The statute merchant and statute staple were designed for the benefit of merchants, and to render unnecessary the arbitrary remedies by way of reprisal by which the amount of debts were then exacted from the countrymen of foreign debtors, or out of their goods. The process may be illustrated by the ancient custom of an English borough, by which if a foreigner became indebted to a townsman, who made oath thereof before the bailiffs, they "directed letters" to the magistrates of the place where the debtor resided, requiring payment, and on default, after three months, a second letter, requiring judgment on the goods, and if insufficient, on the body of the defaulter: failing those applications, the bailiffs were to award an attachment against the next ship from that place or any goods of any inhabitant of that place coming within the liberties of the borough. (Documents relating to the Borough of Great Yarmouth, 1855; and see Hallam's *Europe during the Middle Ages*, vol. 2, p. 398). Remedies of this kind were however not used only against foreigners. By a "Charter of Debtor and Creditor," King Henry III. ordained that neither the property nor the person of a burgess of Yarmouth should be arrested in any part of the king's dominions for a debt of which he was not the principal or the surety, except the person on whose ac-

count he was arrested were also a burgess, and were able to discharge the debt entirely or in part; and except also the burgess arrested had been instrumental in preventing the debtor from doing justice to his creditors.

Other traces of this mode of obtaining payment of debts still remain; and at the present day, by the custom of the city of London, if a plaintiff sue a defendant in the lord mayor's court ineffectually, and a third person indebted to the defendant be found within the jurisdiction, a debt due from such third person by the defendant may be attached after warning to him by the plaintiff, who may enforce payment thereof by execution. It has been attempted to extend this custom to a case in which the cause of action in the original suit did not arise within the city, but in this respect it was declared to be void. (See *Cox v. The Lord Mayor of London*, 1 H. & C. 338; 2 id. 401; 8 Jur., N. S. 542; 32 L. J., N. S. Exch. 64; L. R., 2 E. & I. App. 239; and see *Newman v. Rook*, 4 C. B., N. S. 434.) A like custom exists in Bristol, Exeter and Lancaster (see Pulling's *Customs of London*, 187), and the principle has been adopted in the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 60—65 (783).

(*u*) *Cook v. Fowler*, L. R., 7 E. & I. App. 35, per Lord Chelmsford.

(*x*) *Sherborne v. Tollemache*, 13 C. B., N. S. 742.

the judgment is so entered up under a contract it passes *in invitum*, the object of the voluntary confession being only to shorten and lessen the cost of the judicial process (*y*). And the adverse character which is imputed to such judgments is productive of important consequences, where restrictions are imposed upon the alienation of property (376, 367); for if the warrant of attorney be *bonâ fide* given as security for or to stave off proceedings for the recovery of a debt, and be not part of a contrivance to effect a covert alienation of the property contrary to the restriction, it creates no forfeiture of a lease which contains a covenant against assignment, with a proviso for re-entry on breach; and is not a breach of a covenant not to charge or incumber, by mortgaging or granting any rent-charge or other incumbrance; or which forbids any assignment, mortgage or other mode of anticipation, or any act by which income would become payable to any other than a certain person (*z*). But if the covert intention be shown, the form of security will be no protection against forfeiture.

158. The voluntary character of these instruments is however recognized in the case of infants, who are not allowed either to appoint or appear in court by an attorney (but by guardian only), and who cannot state an account or make any agreement in prejudice of their rights (*a*).

159. A warrant of attorney to confess judgment in any personal action or cognovit actionem, given by any person, shall not be of any force unless there be present some attorney of one of the superior courts (*b*) on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as

(*y*) Per Lord Kenyon, 8 T. R. 61; per Lord Tentenden, 10 B. & C. 468.

(*z*) Doe *d.* Mitchinson *v.* Carter, 8 T. R. 57, 300; Croft *v.* Lumley, 5 E. & B. 648; 2 Jur., N. S. 279; 6 H. L. Ca. 672; Avison *v.* Holmes, 1 Jo. & H. 530; and see cases in note there.

(*a*) Oliver *v.* Woodroffe, 4 M. & W. 650.

(*b*) See Judicature Acts, 1873, s. 87; 1875, s. 14, under which it is assumed that the word "solicitor" should now be substituted for "attorney."

a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. And a warrant of attorney or cognovit not executed in manner aforesaid is not rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (*c*).

By another act (*d*), an additional book or index is directed to be provided, in which only the names, additions and descriptions of the respective defendants or persons giving the warrants or cognovits are entered, and which may be searched on payment of the additional fee mentioned in the act (*e*).

160. Where such warrant of attorney to confess judgment, or cognovit or a true copy thereof, is not filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days next after execution, as required by 3 Geo. 4, c. 39 (which makes it necessary to file an affidavit of the time of execution as prescribed by that statute (*f*)), it shall be deemed fraudulent, and shall be void. And if any such warrant of attorney or cognovit so filed was given subject to any defeasance or condition, such defeasance or condition shall be written upon the same paper or parchment with the warrant or cognovit, before the filing thereof, otherwise the warrant or cognovit shall be void (*g*).

The act of 3 Geo. 4, here referred to, declared that the security and judgment and execution thereon should be fraudulent and void against the assignees in bankruptcy; but it was held that as between the parties they might be good (*h*).

Power is given (*i*) to any of the judges of the court in which

(*c*) 1 & 2 Vict. c. 110, ss. 9, 10; the Debtors Act, 1869, 32 & 33 Vict. c. 62, ss. 24, 25.

(*d*) 6 & 7 Vict. c. 66.

(*e*) Warrants of attorney to confess judgments in Ireland are subjected to nearly the same regulations by 3 & 4 Vict. c. 105, ss. 12—18 inclusive.

(*f*) *Acraman v. Herniman*, 15 Jur. 1008; 16 Q. B. 998; see 12 & 13 Vict. c. 106, s. 136.

(*g*) The Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 26.

(*h*) *Bennett v. Daniel*, 10 B. & C. 500.

(*i*) 3 Geo. 4, c. 39, s. 8.

the warrant of attorney or cognovit is given, to order a memorandum of satisfaction to be written upon such warrant, cognovit or copy thereof respectively as aforesaid, if it shall appear that the debt for which the warrant or cognovit was given has been satisfied or discharged.

The acts apply to warrants of attorney, whether executed in this or in a foreign country (*k*). And it seems that if judgment be signed on a warrant of attorney, which is not made in compliance with the statutes, the defect cannot be waived (*l*).

161. Where a judge's order, made by consent, is given by a defendant in a personal action, whereby the defendant is authorized forthwith, or at any future time, to sign or enter up judgment, or to issue or take out execution, whether such order is made subject to any defeasance or condition or not, the order, if the action is in the Court of Queen's Bench, and a true copy of the order if the action is in any other court, shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making of the order; otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment shall be void (*m*). And the provisions of 3 Geo. 4, c. 39, (ss. 5, 8), and of 6 & 7 Vict. c. 66, as to the filing warrants of attorney and cognovits with the clerk of the docquets and judgments, and for the making entries by such clerk and search in relation thereto, and for entering satisfaction thereon, and for fees for search and filing and taking office copies, extend and apply to every such judge's order (*n*).

A consent to a judge's order for staying proceedings on payment of debt and costs does not require the interposition of a solicitor for the debtor, because nothing can be done by virtue of such a consent until the judge's order is made,

*

(*k*) *Davis v. Trevanion*, 2 Dowl. & L. 743.

(*l*) *Gripper v. Bristow*, 6 M. & W. 807.

(*m*) 32 & 33 Vict. c. 62, s. 27.

(*n*) *Id.* s. 28.

in which respect it differs from a cognovit (*o*). A solicitor is also unnecessary in cases of ejectment (*p*), because the statute is expressly confined to personal actions; and where the defendant himself is a solicitor (*q*): for then he is in no want of that protection which it was the object of the statute to supply.

163. The solicitor who is required to be present on the part of the defendant must not be the solicitor for the plaintiff (*r*); and this rule disqualifies for the office both the London agent of the plaintiff's solicitor, if he be acting as the agent of the latter in the business, and also a solicitor acting as the clerk of the plaintiff's solicitor, though the latter may also have acted for the defendant (*s*); for there is no distinction between principal and agent, either as to the act done, or the duty which attaches to the person who does it. The disqualification is complete, if it can be shown, or inferred from the evidence, that the solicitor acted in the matter for both parties; even though it be proved that the debtor chose to confide in him, and refused to employ any other; and the rule was not relaxed where further advances had been made after the execution of the warrant, and the objection was not raised till some time had elapsed after judgment was signed and execution levied (*t*).

Further, the debtor's solicitor must be "expressly named by him," by which however it is not meant that every solicitor named or suggested by another person, or even by the plaintiff himself or his solicitor, is necessarily excluded. Such a nomination is indeed a reason for a more jealous scrutiny of the transaction, but the object of the statute is obtained if it be shown that the debtor exercised a free, if not an original, choice in the matter. So long as the solicitor is *bond fide*

(*o*) *Thorne v. Neale*, 2 Q. B. 726;
Bray v. Manson, 8 M. & W. 688.

(*p*) *Doe d. Kingston v. Kingston*, 1
Dowl. P. C., N. S. 263.

(*q*) *Chipp v. Harris*, 5 M. & W. 430.

(*r*) *Mason v. Kiddle*, 5 M. & W. 513.

(*s*) *Pryor v. Swaine*, 2 Dowl. & L.

37; *Durrant v. Blurton*, 9 Dowl. P. C.
1015.

(*t*) *Cooper v. Grant*, 12 C. B. 154;
Rising v. Dolphin, 8 Dowl. P. C. 809;
Sanderson v. Westley, *id.* 412; *Hirst v.*
Hannah, 17 Q. B. 383.

appointed by the debtor himself, it matters not by whom he was introduced, or that he was previously a stranger to the debtor, or even that he was paid by the creditor (*u*).

The solicitor is to attend at the debtor's request, to inform him of the nature and effect of the warrant or cognovit before execution. The solicitor is only bound to do this if he be required by the debtor, and is not bound to read the instrument to him unless he desires it. Nor can the debtor complain that proper advice was not given him, either by the solicitor's neglect, or in consequence of his own omission to give the solicitor proper explanations (*x*).

164. The requirements as to the attestation are threefold; comprising subscription by the solicitor as a witness, a declaration that he is solicitor for the person who executes, and subscription as such solicitor. The attestation, though not necessarily in the words of the statute, must show by necessary implication that all these requisites have been fulfilled (*y*). The solicitor may have explained the instrument to the debtor, without acting as his solicitor in doing so; for he may have done it without the debtor's request, or before being employed as his solicitor. And he may subscribe the instrument, yet not as the debtor's solicitor, because though previously so named, and acting, his employment may cease before the attestation (*z*). It is not necessary for the solicitor to state in the subscription that he is expressly named by the debtor, or that he attended at his request (*a*).

165. The defendant himself, though bankrupt, or an outlaw, may dispute on the ground of undue execution, the validity of

(*u*) *Haigh v. Frost*, 7 Dowl. P. C. 743; *Taylor v. Nicholls*, 6 M. & W. 91; *Joel v. Dicker*, 5 Dowl. & L. 1; *Hale v. Dale*, 8 Dowl. P. C. 599; *Pease v. Wells*, *id.* 626; *Barnes v. Pendrey*, 7 Dowl. P. C. 747; *Bligh v. Brewer*, 3 Dowl. P. C. 266; see *Rice v. Linsted*, 7 Dowl. P. C. 153.

(*a*) *Haigh v. Frost*, 7 Dowl. P. C. 743; *Taylor v. Nicholls*, 6 M. & W. 91; *Joel v. Dicker*, 5 Dowl. & L. 1; see *Fisher v. Papanicholas*, 2 Cr. & M. 215.

(*y*) *Pocock v. Pickering*, 18 Q. B. 789; *Holt v. Kershaw*, 5 D. & L. 422; *Lewis v. Lord Kensington*, 15 L. J., N. S., C. P. 100; *Phillips v. Gibbs*, 16 M. & W. 208.

(*z*) *Hibbert v. Barton*, 10 M. & W. 678; *Oliver v. Woodroffe*, 4 M. & W. 650; *Everard v. Poppleton*, 5 Q. B. 181; *Poole v. Hobbs*, 8 Dowl. P. C. 113; *Potter v. Nicholson*, 8 M. & W. 294.

(*a*) *Gay v. Hall*, 5 D. & L. 422.

a warrant of attorney, or of a judgment which has issued thereon; but a third person, unless, like an assignee in bankruptcy, he stands in the debtor's place, cannot do so (*b*). The authority of a solicitor who acts on such an application for an absent debtor, must be proved (*c*).

166. If the warrant of attorney is to confess judgment to two, the survivor will be allowed to enter up judgment (*d*). But an authority to the plaintiff alone to enter up judgment will not extend to his executor (*e*).

Of Charging Orders.

167. An order may be made by any divisional court or by any judge, charging all the interest of the judgment debtor whether in possession, remainder or reversion, and whether vested or contingent, in government or other stock, funds or annuities, or stock or shares in any public company in England, incorporated or otherwise, and whether standing in the name of or in trust for the judgment debtor, and including such property when standing in the name of the Paymaster-General, and the interest, dividends and annual produce thereof. But as to such property when standing in the name of the Paymaster-General, no such order is to prevent the Bank of England, or any public company, from permitting the transfer of or paying the same respectively in such manner as the court shall direct, or shall have any greater effect than if the judgment debtor had charged the property in favour of the creditor, with the amount mentioned in any such order. The order entitles the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; but no proceedings may be taken to obtain the benefit of the charge till the expiration of six calendar months from the date of the charging order (*f*).

(*b*) Taylor v. Nicholls, 6 M. & W. 91; Davis v. Trevanion, 2 Dowl. & L. 743; Chipp v. Harris, 5 M. & W. 430.

(*c*) Lewis v. Lord Tankerville, 11 M. & W. 109.

(*d*) Spong v. Tucker, 1 Y. & J. 206.

(*e*) Henshall v. Matthew, 7 Bing. 337.

(*f*) 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; Irish Act, 3 & 4 Vict. c. 105; Supreme Court of Judicature Act, 1875, Sched. I. Ord. XLVI.

The effect of the order is to create an immediate charge (*g*); but only to the extent to which the debtor himself could have charged the property. The order therefore will be inoperative, if the debt which it was intended to secure be founded upon an illegal contract (*h*).

168. The property to be charged must be standing in the name of or in trust for the judgment debtor; it is not sufficient that he has merely a beneficial interest in it, or in the proceeds of it when sold (*i*); it is therefore a good equitable plea to an action against the holder of the property for permitting its transfer after notice of a charging order *nisi*, that the judgment debtor had no beneficial interest in it (*k*); but the existence of a trust for sale will not prevent the charge, so long as the debtor retains an interest in the property itself (*l*). And by the expression "public company" is to be understood (*m*) a company which has the attributes of publicity, by virtue of an obligation to return to public officers the names and places of abode of its members and of the officers appointed to sue and be sued on its behalf, whether the capital be divided into shares or not.

169. As the charging order may affect funds which are not the subject of litigation, it need not be entitled in any cause or matter (*n*), but only in the acts. It is made in the first instance *ex parte* without notice to the judgment debtor, and is only to show cause why the property should not be charged, and it may properly fix a certain and reasonable period at which cause is to be shown (*o*). But it must not be conditional in form (*p*). In the case of government stocks, funds, or annuities, or shares in public companies standing in the name of the

(*g*) *Montefiore v. Behrens*, L. R., 1 Eq. 171.

(*h*) *Onslow's Trusts*, Re, L. R., 20 Eq. 677.

(*i*) *Taylor v. Turnbull*, 4 H. & N. 495; 33 L. T., Ex. 153; *Dixon v. Wrench*, L. R., 4 Ex. 154. A pension is therefore not within the act. (*Morris v. Manesty*, 7 Q. B. 674.)

(*k*) *Gill v. Continental Gas Co.*, L. R., 7 Ex. 332.

(*l*) *Cragg v. Taylor*, L. R., 2 Ex. 131.

(*m*) *M'Intyre v. Connell*, 15 Jur. 529; 1 Sim., N. S. 252; see *Graham v. Connell*, 19 L. J., Ex. 361.

(*n*) *Lord Hastings v. Bevan*, 10 W. R. 206.

(*o*) 1 & 2 Vict. c. 110, s. 15. *Robinson v. Burbidge*, 9 C. B. 289.

(*p*) *Gibbs v. Flight*, 13 C. B. 803.

judgment debtor "in his own right" (which words do not exclude (*q*) property which has been equitably mortgaged if it be still standing in the name of the debtor), or in trust for the debtor, the order restrains the Bank of England or public company from permitting a transfer till the order is made payable or is discharged; and any person or corporation permitting a transfer after notice becomes liable to the judgment creditor, against whom no disposition by the debtor in the meantime is effectual. The order will be made absolute after proof of notice thereof to the judgment debtor, his solicitor or agent, and unless the judgment debtor shall, within a time to be mentioned in the order, show to a judge sufficient cause to the contrary. A charging order may be made absolute, although costs have been incurred by the trustees in whose name the fund is standing, and who have no other fund for repayment of them, because the order does not affect the right of the court to give directions as to the transfer or payment (*r*).

The court or judge may discharge or vary the order, on the application of the debtor or any person interested, and award such costs upon the application as shall be thought fit (*s*).

170. Where the fund affected by the charging order is in court, a stop order must be obtained. No order will be made on petition for payment of the fund to the creditor without the consent of the owner of it, even though he do not appear on the petition (*t*).

Though a charging order made in terms applicable to the whole fund will be bad so far as relates to the interest of a person who has already established a lien upon it, the order will yet extend to whatever interest the debtor had when it was obtained, and a stop order will be made on the foundation of such a charging order, excepting the interests of the prior incumbrancers (*u*).

The grant of a stop order does not decide the rights of any

(*q*) *Fuller v. Earle*, 7 Exch. 796.

(*r*) *Smith v. Youde*, 2 Fost. & Fin. 376.

(*s*) 1 & 2 Vict. c. 110, s. 15; Judicature Act, 1875, Ord. XLVI.

(*t*) *Nowell, Re*, 9 Jur., N. S. 788; *Whitfield v. Prickett*, 13 Sim. 259; see *Courtroy v. Vincent*, 15 Beav. 486.

(*u*) *Hulkes v. Day*, 10 Sim. 41; *Robinson v. Wood*, 5 Beav. 388.

of the parties, but merely prevents payment or transfer out of court, without notice to the claimant, who is thus enabled to appear and support his rights (*x*). It will be granted only on admission or proof of title, and not (even by consent) without prejudice to the validity of the incumbrance (*y*). It operates only as to the particular charges in respect of which it was obtained (*z*).

A stop order will be granted against a cheque drawn by the Paymaster-General in favour of the judgment debtor, if the cheque have not been delivered out; but the court will not generally give leave to the sheriff to seize it in the hands of the Paymaster-General, not considering, under such circumstances, that it is the property of the debtor (*a*). Where, however, a cheque was delivered out under a power of attorney from the judgment debtor, under circumstances which induced the person to whom it was delivered to return the cheque to the Accountant-General's Office, the sheriff had leave to seize it there, because, though lying in the office of the Accountant-General, it was not considered to be in his possession, but to be the property of the judgment debtor, as if it had not been returned (*b*).

A stop order may also be granted against deeds deposited in court (*c*), but such an order was refused (*d*) to a mortgagee of the reversion of an estate, when the deeds had been brought in by the owner of the particular estate under a decree and merely for the purposes of the suit.

In applying for a stop order, it is not necessary to serve the petition or summons upon the parties to the cause, or upon the persons interested in such parts of the stock or property as are not sought to be affected, but the person who obtains the order or the shares of such stock or other property shall be liable, at the discretion of the court or the judge at chambers, to pay any costs, charges and expenses

(*x*) *Lucas v. Peacock*, 9 Beav. 181.

486.

(*y*) *Winchelsea v. Garraty*, 1 Beav. 228.

(*b*) *Watts v. Jefferyes*, 3 Mac. & G. 422.

(*c*) *Macleod v. Buchanan*, 33 Beav. 234; 9 Jur., N. S. 1266; 10 id. 223.

(*c*) *Williams v. Symonds*, 9 Beav. 528.

(*a*) *Courtroy v. Vincent*, 15 Beav.

(*d*) *Cotton v. Cotton*, 6 Beav. 96.

which by reason of any such order having been obtained shall be occasioned to any party to the cause or matter, or any person interested in such stock or other property (*e*).

Notwithstanding this order, the assignor of the fund must be served with the petition or summons, and the assignment must be proved or admitted. It must also be shown that he has an interest in the fund, though it is not necessary to prove his title to any particular share of it (*f*).

171. If stock to be charged be standing in the name of a trustee, upon trust for a debtor, who has partly a beneficial, and partly a fiduciary interest in the dividends, the order will charge (*g*) so much only of the dividends as is payable to the debtor for his own use and benefit; thus leaving the distribution of the fund to the discretion of the trustees, and if necessary to the order of the court.

Of Orders for Payment of Money.

172. By 1 & 2 Vict. c. 110, s. 18, all decrees or orders of Courts of Equity, rules of Courts of Common Law or orders of a superior jurisdiction in bankruptcy, and of the Lord Chancellor (and Lords Justices) in lunacy, whereby any sum of money or any costs, charges or expenses should be payable to any person, had the effect of judgments in Superior Courts of Common Law; and the persons to whom such monies are payable were judgment creditors within the meaning of the act, and had the same remedies as were given to judgment creditors; and the powers given by the act to the judges of the Superior Courts of Common Law, with respect to matters depending therein, might be exercised by Courts of Equity with respect to matters therein depending and by the judges in bankruptcy, and the Lord Chancellor (and Lords Justices) in lunacy (*h*).

The like effect was given to decrees and orders of the High

(*e*) XXVI. Cons. Ord.

(*f*) Wood v. Vincent, 4 Beav. 419;

Parsons v. Groome, id. 521; Quarman v. Williams, 5 id. 133.

(*g*) Fowler v. Churchill, 11 M. & W. 57.

(*h*) Irish act, 3 & 4 Vict. c. 105, s. 27; but see 13 & 14 Vict. c. 29, ss. 1, 2, 1r.

Court of Admiralty, which was made a Court of Record (*i*); but a judgment order of the Court of Probate under the Court of Probate Act did not create a charge upon lands under 1 & 2 Vict. c. 110, s. 19 (*k*). A judgment for the recovery by or payment to any person of money, may be enforced by any of the modes by which a judgment or decree for the payment of money by any court whose jurisdiction is transferred by the Judicature Acts might have been enforced at the time of the passing thereof (*l*). And every order of the court or a judge, whether in an action or matter, may be enforced in the same manner as a judgment to the same effect (*m*). It has been held, that the Irish act makes no change in the nature of a sequestration issued to enforce obedience to an order of the court, so as to convert it into an execution; the effect of such a proceeding being, as before the act, that the property levied under the sequestration does not belong to the person at whose instance it was obtained, but is applied according to the rights and priorities of the incumbrancers (*n*).

A judgment under the above provisions must be a final judgment for the payment of a specific sum of money, or of a sum, the amount of which can be ascertained by the mere computation of interest or taxation of costs (*o*). A mere judgment for an account, with a direction to pay what is found due, where a set-off is claimed, being only an order for taking an account under which nothing may become payable to

(*i*) Admiralty Court Jurisdiction Act, 1861, 24 Vict. c. 10, ss. 14, 15; and all powers of enforcing judgments possessed by the superior courts of common law or any judge thereof, with respect to matters depending in the same courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the Court of Admiralty with respect to matters therein depending; and all remedies possessed by judgment creditors shall be in like manner possessed by persons to whom any monies, costs, charges or expenses are by such orders or decrees of the Court of Admiralty directed to be paid.

(*k*) 20 & 21 Vict. c. 77, s. 25; Pratt v. Bull, 4 Gif. 117; 1 De G., J. & S. 141; 9 Jur., N. S. 40, 239. But where a decree made under the Divorce Act, 20 & 21 Vict. c. 85, s. 52, had been registered under 1 & 2 Vict. c. 110, the Court of Common Pleas refused to expunge the registration. (Holden, Exp., 18 C. B., N. S. 641; 9 Jur., N. S. 948.)

(*l*) Judicature Act, 1875, Rules; Ord. XLII. (1).

(*m*) Ord. XLII. (20).

(*n*) Burne v. Robinson, 7 Ir. Eq. R. 188.

(*o*) Garner v. Briggs, 4 Jur., N. S. 230.

the plaintiff, will not have the effect of a judgment (*p*). A decree for specific performance, with a reference to compute and tax interest and costs, and an order to pay the amount found due with the purchase-money, appears to be a judgment within the rule, being an order to pay a definite sum and a final adjudication; and such a decree has been held for the purposes of priority to constitute a judgment debt (*q*).

An order of the Court of Chancery for payment of a sum of money into court within a limited time was said not to be within the act (*r*); and property which is sold by a person decreed to pay costs, before the registration of the decree, will not be subject to the payment of such costs, because by sect. 19 the decree has not the force of a judgment until registration (*s*) (681).

173. It must appear on the face of the rule or order of court that the specific sum is to be paid in respect of which relief is sought. Execution therefore will not be issued to enforce payment of a sum ordered to be paid by an award, though the agreement under which the award was made had been made a rule of court. The proper mode of enforcing such an order is to call upon the debtor to show cause why he should not pay the specified sum, and upon this rule being made absolute execution will issue for that amount (*t*); but execution issued under an ex parte order for payment will be set aside (*u*). A rule nisi for the payment of a sum awarded will not however always be granted, even though the validity of the award be free from doubt. The proceeding is in the nature of an attachment, and the court will not grant (*x*) a summary remedy which will shut out discussion on the merits, where there is a cross demand, or a reasonable doubt from

(*p*) *Chadwick v. Holt*, 8 De G., M. & G. 584; 2 Jur., N. S. 918.

(*q*) *Duke of Beaufort v. Phillips*, 1 De G. & S. 321; but see *Chadwick v. Holt*, 2 Jur., N. S. 918.

(*r*) *Gibbs v. Pike*, 8 M. & W. 223.

(*s*) *Nortcliffe v. Warburton*, 8 Jur., N. S. 854; and see 18 & 19 Vict. c. 15, s. 4.

(*t*) *Jones v. Williams*, 11 A. & E. 175; *Doe v. Amery*, 8 M. & W. 565.

(*u*) *Rickards v. Patterson*, 8 M. & W. 313.

(*x*) *Doe v. Amery*, 8 M. & W. 565; *Dickenson v. Allsop*, 18 id. 722; *MacKenzie v. Sligo and Shannon Rail. Co.*, 9 C. B. 250; *Lambe v. Jones*, 9 C. B., N. S. 478.

whom the balance will be ultimately due, or as to the validity of the award, unless the defendant have failed to avail himself in proper time of the objections.

The act only applies to those costs, charges and expenses, the obligation to pay which appears on the face of the order or decree, and not to those the title to which is incomplete without some further act of the creditor (*y*). It is not, however, necessary in the case of costs that an order for payment of the specific sum found due by the taxing master should be obtained.

When a judgment or order shall have been made for payment of costs in any suit, and such suit shall afterwards abate, any person interested under the judgment may from time to time revive the suit and prosecute and enforce the decree or order (*z*).

A judge's order under the act 7 & 8 Vict. c. 73, s. 43, ordering judgment to be entered up for the taxed amount of a solicitor's bill, has the same effect as a rule of court for payment of money under sect. 18 of the Judgment Act (1 & 2 Vict. c. 110), and the costs of an action brought to recover the taxed costs will be disallowed (*a*).

174. An order in lunacy directing taxation of costs, with an inquiry if it would be proper to raise them by sale or mortgage of the real estate, does not make the costs a judgment debt or a charge, in equity on the real estate, though it seems it would be otherwise if the costs were directed to be paid (*b*). Nor did the allocatur of the master of a court of common law (*c*), nor it seems the certificate of the chief clerk of a judge in Chancery (*d*), constitute an order for payment of money within sect. 18. The right of the creditor under an order for payment of costs dates (*e*) from the first registration of the certificate

(*y*) *Jones v. Williams*, 8 M. & W. 340.

(*z*) 33 & 34 Vict. c. 28 (Attorneys' and Solicitors' Act, 1870), s. 19. The statute does not apply to an abatement which happened before it passed. (*Doggett v. E. C. Rail. Co.*, L. R., 6 Ch. 474.)

(*a*) *Griffiths v. Hughes*, 16 M. & W. 809.

(*b*) *Stedman v. Hart*, Kay, 607.

(*c*) *Shaw v. Neale*, 20 Beav. 174; 6 H. L. Ca. 581.

(*d*) *Mansfield v. Ogle*, 5 Jur., N. S. 419; 4 De G. & J. 88.

(*e*) *Hargrave v. Hargrave*, 23 Beav. 484.

of taxation in the office of the Senior Master of the Common Pleas.

The statute applies to a judgment entered up on a contingent debt, though where the property charged was an annuity, the payments of the annuity which accrued before the judgment debt became actually due were held not to be affected thereby (*f*).

175. Orders for the payment of money are within the act only (*g*) when the money is directed to be paid to the creditor himself, and not when it is to be paid for his benefit merely; and because the statute always contemplates payment to some person, no judgment can be registered effectually which orders money to be paid into court. This difficulty will be avoided by ordering, when it can be done with safety, the payment to be made to the plaintiff upon his undertaking to pay the money into court, or in the case of a tenant for life by directing payment to the person entitled in remainder, upon trust during the life interest (*h*).

176. The provisions of the act of 1 & 2 Vict. c. 110, which were applicable to the Courts of Common Law at Westminster, and the judgments and proceedings thereof, were extended by sect. 21 of that act to the Court of Common Pleas of the Palatine of Lancaster and to the Court of Pleas of the Palatine of Durham, within their respective limits of jurisdiction; the judgments of each having, under certain regulations, the effect of judgments of the Superior Courts at Westminster. And by the act of 1855, s. 2, the provisions of 1 & 2 Vict. c. 110, ss. 18, 19, 20, were extended to the Courts of Common Law of the counties Palatine and the Chancery of the County Palatine of Durham, registration being also required there (*i*).

(*f*) *Youngehusband v. Gisborne*, 1 De G. & S. 209.

(*g*) *Crowther v. Crowther*, 2 Jur., N. S. 274; 25 L. J. (N. S.) Ch. 511.

(*h*) *Wand v. Docker*, 5 Jur., N. S. 1287; *Ward v. Shakshaft*, 2 L. T.,

N. S. 203; see 1 Dr. & S. 269; *Gibbs v. Pike*, 8 M. & W. 223.

(*i*) The jurisdictions of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham are now vested in the High Court of Judicature. (Judicature Act, 1873, s. 16.)

177. In all cases (*i*) where final judgment should be obtained in any action or suit in any inferior court of record, in which, at the time of passing the act, a barrister of not less than seven years' standing should act as judge, assessor or assistant in the trial of causes, and in all cases where any rule or order should be made by any inferior court of record as aforesaid, whereby any sum of money, costs, charges or expenses should be payable to any person, the judges of any of the superior courts of record at Westminster, or, if the inferior court were within the County Palatine of Lancaster, the judges of the Court of Common Pleas at Lancaster (*k*), or any judge of any of the said courts at Chambers, were authorized, either in term or vacation, upon the application of any person who should recover such judgment, or to whom any money, costs, charges or expenses should be payable by such rule or order, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, the same being respectively under the seal of the inferior court and the signature of the proper officer thereof, to order the judgment, rule or order of such inferior court to be removed into such superior court, or Court of Common Pleas at Lancaster, as the case might be; and immediately thereupon such judgment, rule or order has the same force and effect as a judgment recovered in, or a rule or order made by, such superior court; and all proceedings may immediately be taken thereupon, or by reason or in consequence thereof, as if such judgment, rule or order had been originally recovered in or made by the superior court, or the Court of Common Pleas at Lancaster; and all the reasonable costs and charges attendant upon such application and removal shall be recovered as if the same were part of such judgment, rule or order.

178. But by the act of 1855 (*l*), no such judgment, which had been or thereafter should be so removed, was to bind any

(*i*) 1 & 2 Vict. c. 110, s. 22. Corresponding Irish act, 3 & 4 Vict. c. 105, s. 80.

(*k*) The jurisdiction of the Court of Common Pleas at Lancaster and the

Court of Pleas at Durham are now vested in the High Court of Judicature. (Judicature Act, 1873, s. 16).

(*l*) 18 & 19 Vict. c. 15, s. 7.

lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless after such removal it were registered, and if necessary re-registered, as it must have been if it had been originally entered up in one of the superior courts, or in the Court of Common Pleas at Lancaster, as the case might be. But after the passing of the act every such judgment, rule or order, so registered or re-registered, was made as binding as other judgments, rules or orders of the superior courts or of the Court of Common Pleas at Lancaster. By the same section, a proviso in 1 & 2 Vict. c. 110, s. 22, that no such judgment, rule or order when removed should affect any hereditaments as to purchasers, mortgagees or creditors, further than the same would have done if it had remained a judgment, rule or order of the inferior court, unless and until a writ of execution thereon should be actually put into the hands of the sheriff or other officer appointed to execute the same, was repealed.

179. The superior court will assume that the judgment removed is valid, and will not inquire into the regularity of the proceeding upon which it was founded (*m*). The act does not apply to judgments of county courts established under the modern County Court Act (*n*), the intention of which was to confine the remedies of the creditor to such as were specially given him by that act, though it was otherwise as to the judgments of the old county courts (*o*).

A judgment by the equity side of an inferior court, as of that of the vice-warden of the Stannaries, may also be removed (*p*).

Of the Registration of Judgments.

180. The County Registration Acts (45) provide that no judgment, statute or recognizance, except such as shall be made to the crown, shall bind or affect any lands, tenements

(*m*) *Simons v. Count de Wints*, 8 Dowl. P. C. 646.

(*n*) See 9 & 10 Vict. c. 95; *Moreton v. Holt*, 10 Exch. 707.

(*o*) *Williams v. Jones*, 13 M. & W. 628.

(*p*) *Harvey v. Gilbard*, 7 Dowl. P. C. 616. The jurisdiction of the Lord Warden of the Stannaries is now vested in the Court of Appeal. (*Judicature Act*, 1873, s. 18(3).)

or hereditaments within the district but only from the time of the entry at the register office of a memorial containing the particulars mentioned in the several acts (*q*). And several of the acts also provide that, if any judgment, statute or recognizance be registered within thirty days after the acknowledgment or signing thereof, all the lands that the defendant or cognizor had at the time of such acknowledgment or signing shall be bound thereby (*r*).

181. The statute 1 & 2 Vict. c. 110, provides (*s*) that no judgment, decree, order or rule should by virtue of that act affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until (*i. e., from the time only at which*—the words not giving a retrospective validity (*t*)) a memorandum containing the name (*u*) and usual or last place of abode, and the title, trade or profession of the judgment debtor and the court and title of the cause or matter in which the judgment, decree, order or rule shall have been obtained or made, and the date thereof and the amount of the debt or monies thereby recovered or ordered to be paid, shall be left with the Senior Master of the Court of Common Pleas, who is to register the same, with the year and day of the month when every such memorandum or minute is left with him (*x*); notwithstanding, as was declared by 3 & 4 Vict. c. 82 (*y*), any notice of any such judgment, decree, order or rule to any such purchaser, mortgagee or creditor. But as this protection only extended to judgments, &c. which were binding by virtue of

(*q*) Middlesex act, 7 Anne, c. 20, s. 18; North Riding, 8 Geo. 2, c. 6, ss. 18, 19; West Riding, 5 Anne, c. 18, s. 4; East Riding and Kingston-upon-Hull, 6 Anne, c. 35, s. 19.

(*r*) West Riding act, s. 11; East Riding and Kingston-upon-Hull act, s. 28; North-Riding act, s. 33; the period being twenty days. And as to the entry of satisfaction on judgments and recognizances, see the North Riding, West Riding, and East Riding and Kingston-upon-Hull acts.

(*s*) Sect. 19. See the Irish acts, 3 & 4 Vict. c. 105, s. 28; 7 & 8 Vict.

c. 90, ss. 2, 3, 4, 5; 11 & 12 Vict. c. 120.

(*t*) Hargrave v. Hargrave, 23 Beav. 484.

(*u*) If the name of the person whose estates are intended to be bound by the judgment be correctly entered in the register, the judgment will bind though in the writ of summons and the title of the cause in the register book the judgment debtor be misnamed. (Beavan v. Oxford, 3 Sm. & G. 11; 1 Jur., N. S. 154; see Hotham v. Somerville, 9 Beav. 68.)

(*x*) 2 & 3 Vict. c. 11, s. 3.

(*y*) Sect. 2.

the act 1 & 2 Vict. c. 110, s. 19, that restriction was removed by 18 & 19 Vict. c. 15 (z), which provided, that no judgments which *might* be registered under the former act should be effectual against any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless duly registered, notwithstanding notice thereof (189).

182. It was provided by 2 & 3 Vict. c. 11 (a), that all judgments of the superior courts, decrees or orders in equity, rules at common law and orders in bankruptcy or lunacy, which had been registered since the passing and under the provisions of the act of 1 & 2 Vict., or which should thereafter be so registered, should be void from the expiration of five years from the date of entry, against lands, tenements and hereditaments, as to purchasers, mortgagees or creditors (*i. e.*, all such as derive title through the debtor, and who, but for the statute, would be affected by the judgment (b), but such creditors only as are in a position to assert a right against the land, and not simple contract creditors (c)), unless in like manner they were re-registered within five years before the execution of the conveyance, mortgage or other instrument vesting or transferring a legal or equitable estate or right in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the creditor's right accrued, and so toties quoties at the end of every succeeding five years. The intention of this act was to make five years' search a complete protection to an intending purchaser, mortgagee or creditor. Under it the registration protects the registered incumbrancer against purchasers, mortgagees or creditors whose incumbrances were acquired during the currency of the first or any subsequent registration; but neither the first nor any subsequent registration

(z) Sect. 4.

(a) Sects. 1, 2, 4. Extended to common law and equity courts of counties palatine by 18 & 19 Vict. c. 15, s. 3; see in Ireland, 7 & 8 Vict. c. 90, ss. 6—9; 13 & 14 Vict. c. 29, ss. 3, 4. As to the effect of this statute, see *Beavan v. Lord Oxford*, 2 Jur., N. S. 121; 6 De G., M. & G. 507.

(b) *Benham v. Keane*, 1 J. & H. 685; 7 Jur., N. S. 1096; 3 De G., F. & J. 318.

(c) *Simpson v. Morley*, 2 K. & J. 71; distinguishing *Perrin*, *In re*, 2 Dru. & War. 147, where, on the plain construction of the Irish act, 3 & 4 Vict. c. 105, s. 22, simple contract creditors were held to be referred to.

will protect against purchasers, mortgagees or creditors whose titles were acquired during the intervals between the first registration, and any re-registration not duly made at the expiration of the five years from the first registration (*d*).

And re-registration is declared by 18 & 19 Vict. c. 15 (*e*) to be sufficient to bind purchasers, mortgagees and creditors if done within the five years before the execution of the conveyance, mortgage, &c. vesting or transferring the legal or equitable right, title, estate or interest in or to any purchaser or mortgagee for valuable consideration, or within five years before the accruer of the creditor's right, though more than five years should have elapsed since the last previous registration before the re-registration, and so toties quoties upon every re-registry.

The provision of 3 & 4 Vict. c. 82, s. 2, that no purchasers, mortgagees or creditors should be affected by any unregistered judgment, &c., notwithstanding notice thereof, was declared to extend, as well to the act therein referred to (*viz.*, 1 & 2 Vict. c. 110, and to judgments which bound *by virtue of that act*), as to the provision in sect. 4 of 2 & 3 Vict. c. 11, which requires re-registration (*f*), as re-registration is explained by the act of 1855. "So that," says the last-mentioned act, "notice of any judgment, decree, order or rule, not duly re-registered, shall not avail against purchasers, mortgagees or creditors as to lands, tenements or hereditaments." The evident intention of this enactment was to put purchasers, mortgagees and creditors on the same footing as to judgments not re-registered, as that upon which they were put by the previous section, with respect to judgments not registered. Now the act (3 & 4 Vict. c. 82, s. 2) which protected against judgments not registered, notwithstanding notice, was confined to judgments affecting property by virtue of 1 & 2 Vict. c. 110; that restriction being removed, as we have seen, by 18 & 19 Vict. c. 15, s. 4. But in extending the protection

(*d*) *Beavan v. Lord Oxford*, 6 De G., M. & G. 492; 1 Jur., N. S. 1121; and see *Hickson v. Collis*, 1 Jo. & L. 94; *Shaw v. Neale*, 6 H. L. C. 581; *Benham v. Keane*, 1 J. & H. 685; 3

De G., F. & J. 318; 7 Jur., N. S. 1099; 8 id. 604.

(*e*) Sect. 6.

(*f*) Act of 1855, s. 5.

against judgments not re-registered, the act of 3 & 4 Vict. has been taken as it stood before it was enlarged by 18 & 19 Vict. c. 15. If, however, the last clause of the 5th section be taken as a positive enactment, no difficulty will arise upon the point.

183. The provisions for the re-registry of judgments, decrees or orders, and rules or orders, contained in 2 & 3 Vict. c. 11, as explained by 18 & 19 Vict. c. 15, have also been declared (*g*) to extend and apply to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as is by 2 & 3 Vict. c. 11, s. 8, required to be registered; so that it is made obligatory on the crown, in order to bind the lands, tenements or hereditaments of its debtors or accountants, as against purchasers, mortgagees or creditors becoming such after the 31st December, 1859, to re-register in like manner as a private person; and so that notice of any such judgment, &c. not duly re-registered, shall not avail against purchasers, mortgagees or creditors becoming such after that day, as to lands, tenements, or hereditaments. And the provision applies to every such judgment, statute, recognizance, inquisition, obligation, specialty, or acceptance of office, as since the passing of 2 & 3 Vict. c. 11, had been, or as should after the passing of the present act be, so registered.

184. No *lis pendens* (960) shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name, usual or last place of abode, and title, trade or profession of the person whose estate is intended to be affected thereby, and the Court of Equity, title of the cause or information, and the day when the bill or information was filed, shall be left with the Senior Master of the Court of Common Pleas (*h*); and the provisions with regard

(*g*) 22 & 23 Vict. c. 35, s. 22; not extending to Ireland.

(*h*) 2 & 3 Vict. c. 11, s. 7. The provision extends to special cases, 13 & 14 Vict. c. 35, s. 17; and was extended to

common law and equity courts of counties palatine by 18 & 19 Vict. c. 15, s. 3. See in Ireland 7 & 8 Vict. c. 90, s. 10; 11 & 12 Vict. c. 120, s. 12; 13 & 14 Vict. c. 29, s. 5.

to the re-entering of judgments every five years (i) extend to every case of *lis pendens* registered under the act.

185. No judgment, statute or recognizance, or obligation or specialty on behalf of the crown shall affect any lands, tenements or hereditaments, as to purchasers or mortgagees, unless and until a memorandum of the name, usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected; and in the case of any judgment, the court, title of the cause, date and amount of the debt, damages and costs; and in the case of a statute or recognizance, the date, the amount of the sum acknowledged, and before whom it was acknowledged; and in the case of an inquisition, the date and the sum found due; and in the case of an obligation or specialty, the date and sum for which the obligee shall be bound, or for which it shall be made; and in the case of acceptance of office, the name of the office and time of acceptance, shall be left for registration with the Senior Master of the Common Pleas for entry in the index to debtors and accountants to the crown, by the name of the person intended to be affected (k).

And the Crown Suits, &c. Act, 1865 (l), provides that any judgment, decree or order obtained after the commencement of the act by or on behalf of the crown, or any recognizance entered into after the commencement of the act on the proper account of the crown, or any inquisition finding after the commencement of the act a debt due to the crown on any obligation or specialty to the crown made, or any acceptance of office from or under the crown, accepted after the commencement of the act, shall not affect any land of whatever tenure as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, whether with or without notice of the judgment, decree or other incumbrance, unless a writ of extent or of *diem clausit extremum*, or other writ or process of execution in pursuance of or in relation to such judgment, decree or other incumbrance, has been issued and registered before the execution of the

(i) 2 & 3 Vict. c. 11, s. 4.

(k) *Id.* s. 8.

(l) 28 & 29 Vict. c. 104, s. 48. As to the mode of registration, see s. 49.

conveyance or mortgage to such purchaser or mortgagee, and the payment by him of the purchase or mortgage money. This act makes no provision for re-registration.

186. Another statute provided (*m*) that no judgment which had not already been, or should not thereafter be, entered or docketed under the several acts then in force, so as to bind lands, tenements or hereditaments as against purchasers, mortgagees or creditors, should have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' effects. It is not, however, necessary for the purpose of such preference (*n*), that judgments obtained against executors or administrators should be registered, inasmuch as they must know of the existence of such judgments (*o*).

The act also provided that no judgment which, since the passing of the 1 & 2 Vict. c. 110, had been registered under the provisions therein contained, or contained in the act of 2 & 3 Vict. c. 11, as explained and amended by the act of 18 & 19 Vict. c. 15, or which should thereafter be so registered, should have any preference as against heirs, executors or administrators, in their administration of their ancestors', testators' or intestates' estates, unless, at the death of the testator or intestate, five years should not have elapsed from the date of the entry thereof on the docket, or from the only or last re-registry thereof, as the case may be; which re-registry from time to time was thereby authorized to be made in manner directed by the said act of 2 & 3 Vict., as explained and amended by the act of 18 & 19 Vict. But it is declared to be sufficient to secure such preference if such a memorandum, as was required in the first instance, is again left with the Senior Master of the Common Pleas within five years before the death of the testator or intestate, though more than five years shall have expired since the last pre-

(*m*) 23 & 24 Vict. c. 38, s. 3. The act is not retrospective. (*Evans v. Williams*, 2 Dr. & Sm. 324; 11 Jur., N. S. 256.)

(*n*) Sect. 4. (*o*) *Jennings v. Rigby*, 33 Beav. 198; 9 Jur., N. S. 1144.

vious registration before such last-mentioned memorandum or minute was left, and so toties quoties upon every re-registry (1308).

187. The act of 23 & 24 Vict. c. 38, also provided (*p*), that the registry thereby required of any writ of execution or other due process, on any judgment, statute or recognizance, in order to bind a purchaser or mortgagee, should be made by a memorandum or minute referring to the judgment, statute or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; and that the memorandum or minute should be registered by the Senior Master of the Common Pleas in alphabetical order by the name of the person in whose behalf the judgment was registered, together with the time of the leaving of the minute. And the provisions of the act with regard to writs of execution or other process, or the registry thereof or otherwise relating thereto, were extended *mutatis mutandis* to writs of execution or other due process issuing on judgments of the Courts of Common Pleas of the County Palatine of Lancaster, and of Pleas of the County Palatine of Durham (*q*). But not to Ireland.

And by the act of 27 & 28 Vict. (*r*), every writ or other process of execution of any such judgment, statute or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by 23 & 24 Vict. c. 38, but in the name of the debtor against whom the writ or process was issued, instead of, as under the last-mentioned act, the name of the creditor, and no other or prior registration shall be necessary for any purpose, and no reference to any such prior registration shall be required to be made by the minute to be left with the master.

The word "debtor" in this statute includes (*s*) husbands of married women, assignees of bankrupts, committees of lunatics and the heirs or devisees of deceased persons.

(*p*) Sect. 2.

(*q*) Now merged in the High Court of Justice. Judicature Act, 1873, s. 16.

(*r*) Chap. 112, s. 3.

(*s*) Sect. 2.

188. The necessity for the registration of judgments under the Middlesex and other local registry acts (**181**) is not affected by the provisions of the judgment acts for registration in the Common Pleas and other courts therein mentioned, a judgment registered under the last-mentioned statutes being no charge upon lands in a register county until it be registered under the local act (*t*).

The Court of Common Pleas has refused to control the Senior Master in the matter of registration, in which he exercises his own jurisdiction. It has been intimated that in case of his refusal to register a judgment the proper remedy would be by mandamus (*u*).

189. The Judgments Extension Act (*x*), 1868, provided that where judgment shall be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas or Exchequer at Westminster or Dublin respectively for any debt, damages or costs, a certificate thereof in the form prescribed by the act, signed by the proper officer of the court where the judgment has been obtained or entered up, and registered by the Master of the Court of Common Pleas at Dublin, where the judgment was obtained at Westminster in a register to be called "The Register for English Judgments," and by the Senior Master of the Court of Common Pleas at Westminster, where the judgment was obtained in Dublin in a register to be called "The Register for Irish Judgments," shall from the date of registration be of the same force and effect, and all proceedings may be taken thereon, as if the judgment had been originally obtained or entered up on the date of such registration in the court in which it is so registered; and all reasonable costs and charges of obtaining and registering such certificate shall be recovered as if the same were part of the original judgment. Provided that no certificate of any such judgment shall be so registered more than twelve months after the date of the judgment, unless leave shall have been first obtained from the court,

(*t*) *Johnson v. Holdsworth*, 1 Sim., N. S. 106; *Allcard, Exp., Fonbl. Bank. Ca.* 217.

(*u*) *Ness, Exp.*, 5 C. B. 155.
(*x*) 31 & 32 Vict. c. 54, s. 1.

or a judge of the court, in which it is sought to register such certificate.

In like manner, where judgment has been obtained or entered up in one of the same courts at Westminster or Dublin for any debt, damages or costs, a like certificate thereof registered at the office in Edinburgh for the registration of deeds, bonds, protests, and other writs registered in the books of council and session in "The Register for English and Irish Judgments," in like manner as a bond executed according to the law of Scotland, with a clause of registration for execution therein contained, shall from the date of registration be of the same force and effect as a decret of the Court of Session; and all proceedings may be had on an extract of such certificate as if the judgment had been a decret originally pronounced in the Court of Session on the date of such registration; with a similar provision as to costs, charges and expenses, and a proviso that no certificate shall be registered more than twelve months from the date of the judgment, unless leave shall have first been obtained from the Lord Ordinary on the bills (y).

In like manner on the registration at Westminster or at Dublin respectively of a certificate of an extracted decret of the Court of Session in Scotland, purporting to be signed by the extractor of the Court of Session, or other officer duly authorized, or of a certificate of an extracted decret of registration in the books of Council and Session, purporting to be signed by the keeper of the register of deeds, &c. registered for execution in the books of Council and Session, for the payment of any debt, damages or expenses, in a register to be kept in the Court of Common Pleas at Westminster and Dublin respectively, to be called "The Register for Scotch Judgments," the certificate shall from the date of registration be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered, and the costs of obtaining and registering the certificate shall be recoverable in like manner as if the same were part of the decret of which it is a certificate. Provided that no certificate shall be registered more than twelve

months after the date of the decret, unless leave shall have been first obtained from the court, or a judge of the court, in which it is sought to register such certificate; and that where a note of suspension or sist of execution of any such decret shall have been granted, on the production of a certificate thereof to a judge of the court in which the certificate of decret has been registered, execution on the registered certificate shall be stayed until production of a certificate that the sist has been recalled or has expired, or of a decret of the court repelling the reasons of suspension (*z*).

The Courts of Common Pleas at Westminster and Dublin respectively, and the Court of Session in Scotland, have the same control and jurisdiction over any judgment or decret, or any certificate thereof registered under the act in such courts respectively, as they had at the passing of the act over any judgment or decret in their own courts, but so far only as relates to execution under the act (*a*).

190. The effect of an ordinary judgment under the Irish act, 3 & 4 Vict. c. 105, s. 28, which corresponded with the English act, 1 & 2 Vict. c. 110, has been altered by a subsequent statute (*b*), which provides that the creditor under any judgment in a superior court, or decree or order in equity, or rule in a court of common law, or order in bankruptcy or lunacy, having the effect of a judgment, or any judgment obtained in an inferior and removed into a superior court, may file in the superior court or court of equity, or (in case of an order in bankruptcy or lunacy) in the Court of Chancery in Ireland, an affidavit containing the particulars mentioned in the act, which may be registered in the office for registry of deeds, conveyances and wills in Ireland, the creditor being deemed to be the grantee, the debtor the grantor and the debt the consideration, and the registration of which shall vest in the creditor all the hereditaments mentioned therein, for all

(*z*) 31 & 32 Vict. c. 54, s. 3.

(*a*) Id. s. 4.

(*b*) 13 & 14 Vict. c. 29, ss. 6—11,
amended by 21 & 22 Vict. c. 105. As

to the form of the affidavit, see Thorp
v. Browne, L. R., 2 E. & I. App. 220,
and cases there.

the estate and interest possessed or capable of being created by the debtor therein, but subject to redemption on payment of the debt mentioned in the affidavit; and the creditor shall have the same remedies in respect of the hereditaments as if a conveyance subject to redemption had been made and registered; and every such voluntary conveyance made subsequent to the date of the judgment mentioned in the affidavit, as would be void against purchasers for money or other good consideration, shall be void as against the creditor registering the affidavit. But the act does not affect the law concerning conveyances and other acts made to delay, hinder or defraud creditors.

Such chattel interests in lands, tenements or hereditaments, as might have been taken in execution under any writ of *f. fa.* if the act of 3 & 4 Vict. c. 105 (Ireland), had not passed, may be taken in execution notwithstanding the present act. And in the administration of the assets of any judgment debtor dying seised of any estate or interest in lands, tenements or hereditaments, the rights of the judgment creditor are preserved.

This act does not alter the rule that the judgment only operates upon the estate and interest which the debtor had or might create by virtue of any disposing power (152), the object being only to compel the creditor to specify the lands upon which the judgment is to attach (*c*). A judgment may be registered under it as a mortgage against an incorporated railway company (*d*).

191. By the Irish act, 7 & 8 Vict. c. 90 (*e*), no judgment, statute or recognizance, or obligation or specialty on account of the crown, or any acceptance of office, shall affect any lands, tenements, or hereditaments as to purchasers or mortgagees, unless and until (181) the same shall be registered as directed by the act, in the Index to Debtors and Accountants to the crown. And by 11 & 12 Vict. c. 120 (*f*), no judgment,

(*c*) *Eyre v. M'Dowell*, 9 H. L. Ca. 619.

(*d*) *Bagnal, Exp.*, 13 L. T., N. S. 69.
As to the effect of s. 10, as an exception

referred to in s. 1, see *Gerrard, Exp.*, 14 Ir. Ch. Rep. 466.

(*e*) Sects. 11, 12.

(*f*) Sect. 12.

crown bond, rule, decree, order, or *lis pendens*, is to be so registered unless a certificate of its existence, signed by the proper officer of the court in which it was entered or obtained, be subscribed to the memorandum left with the registrar; and by 34 & 35 Vict. c. 72, s. 22, a certified copy duly authenticated according to the Public Records (Ireland) Act, 1867, is substituted for the certificate where the record has been removed to the Public Record Office.

By the 11 & 12 Vict. c. 120 (*g*), it was also made necessary to re-register bonds and recognizances to the crown so registered which were more than twenty years old from the date thereof. And by the act of 34 & 35 Vict. c. 72 (*h*), similar provisions were made respecting the re-registration of judgments obtained at the suit of the crown which should be more than twenty years old from the date thereof, the title of the register-book being directed to be "Re-docketed Crown Bonds, Recognizances and Judgments at the Suit of the Crown."

By the same act (*i*), no recognizance, crown bond, judgment at the suit of the crown, statute, inquisition or acceptance of office registered or re-docketed under 7 & 8 Vict. c. 90, or under 11 & 12 Vict. c. 120, more than four years before the passing of 34 & 35 Vict. c. 72, shall, after the expiration of one year from the passing of the last-mentioned act, affect lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until the same is re-registered within five years before the execution of the instrument vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditor accrued; provided, that where twenty years from the date of such bond or recognizance had expired or would expire before the expiration of one year before the passing of the act, the act should not dispense with the re-docketing under 11 & 12 Vict. within such twenty years, or give any greater validity to the bond or recognizance than it would formerly have had under the last-mentioned act.

By the Irish Judgment Act, 1871 (*k*), the registrar of judgments is to enter in a register book, the particulars contained in every memorandum left with him for the registry or re-entry of any judgment, revival decree, order, *lis pendens*, or civil decree for poor rates, or for the registry or re-docketing of any recognizance, crown bond, judgment at the suit of the crown, statute, inquisition or acceptance of office. And provisions are made for enabling persons to search the register and to obtain certificates of the results.

By the same act (*l*), no recognizance, crown bond, judgment at the suit of the crown, statute, inquisition or acceptance of office, registered or re-docketed within four years before the passing of the act, under 7 & 8 Vict. or 11 & 12 Vict., or which subsequently should be registered or re-docketed, or re-registered under either of these acts, or under 34 & 35 Vict., shall, after five years from the date of such registry, re-docketing or re-registry, affect lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until the same be re-registered within five years before the execution of the instrument vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditor accrued, and so *toties quoties* at the expiration of every succeeding five years.

(*k*) 34 & 35 Vict. c. 72, ss. 2—7.

(*l*) Sect. 12.

CHAPTER II. PART 1.—(B). OF EQUITABLE LIENS.

193. *Of the Lien upon Land for Purchase-money.***197.** *Of Partnership Liens.***204.** *Of Agency Liens.***205.** *Of Liens for Expenditure upon the Property of another, and herein of Salvage Liens and Liens upon West India Estates.***214.** *Of the Liens of Trustees for Expenditure and for the Security of Property subject to Trusts.***223.** *Of the Liens of Solicitors upon the Fruits of Judgments and Decrees.***235.** *Of Maritime Liens.*

192. EQUITABLE liens arise upon the consideration of a duty or implied intention on the part of the owner of property to make it answerable for the claim.

193. A vendor has a lien for unpaid purchase-money, which, though of an equitable character, was recognized at law as well as in equity, and for the purchase-money of chattels as well as of real estate: but with this distinction, that, inasmuch as there was not as a general rule any lien at law without possession, the vendor of land could have no lien at law for purchase-money after he had executed an absolute conveyance, either upon the land or the deeds (*m*), which, though they may actually be in the vendor's possession, belong of right to the owner of the estate. Nor, for the same reason, had the vendor of chattels any lien for the price after he had parted with possession of them. But the vendor's right in equity against real estate is independent of possession, and exists as well after as before conveyance (*n*), and will now be enforced by all the courts under the Judicature Acts.

194. The vendor's lien rests upon the plain principle of equity, that he who has obtained possession of property under

(*m*) *Goode v. Burton*, 1 Exch. 189; 16 L. J., N. S., Exch. 309; *Eddale v.*

there.

Oxenham, 3 B. & C. 229, explained

(*n*) *Wront v. Dawes*, 4 Jur., N. S. 397; 25 Beav. 369.

a contract for payment of the value shall not keep it without payment (*o*).

It exists generally (the contract not being illegal (*p*)), without distinction as to the freehold, copyhold or leasehold tenure (*q*) of the estate, where the whole or part of the purchase-money is unpaid (*r*), though a receipt may have been given for it (*s*), and whether the consideration be a sum in gross or an annuity (*t*), as against the purchaser, his heir, volunteers, persons having equitable interests, and purchasers with notice of the non-payment of the purchase-money and claiming under the original purchaser (*u*). And where the consideration is expressed to be paid in the deed, but is in fact wholly or partly left unpaid, parol evidence may be given on the part of the vendee of the real transaction, because it is the vendor himself who, by claiming a lien, is the first to set up an equity against the written statement in the deed (*x*). The lien extends to money advanced by the unpaid vendor to the purchaser for improvements (*y*).

The lien arises for the price payable for land taken by a public company either under the Lands Clauses Act or by agreement (*z*); and as well where the consideration is a rent-charge as where it is a gross sum (*a*), and also for the compensation for severance when it forms part of the purchase-

(*o*) *Mackreth v. Symmons*, 15 Ves. 328.

(*p*) *Ewing v. Osbaldeston*, 2 Myl. & Cr. 88.

(*q*) *Winter v. Lord Anson*, 3 Russ. 492; *Matthew v. Bowler*, 6 Hare, 110; *Elliott v. Edwards*, 3 Bos. & P. 181.

(*r*) *Harrison v. Southcote*, 2 Ves. 303; *Austen v. Halsey*, 6 Ves. 483; *Elliott v. Edwards*, *supra*.

(*s*) *Saunders v. Leslie*, 2 Ba. & Be. 514.

(*t*) *Tardiff v. Scrugan*, cited 1 Bro. C. C. 422; *Richardson v. McCausland*, Beat. 457, explaining *Mackreth v. Symmons*, 15 Ves. 328; *Clarke v. Hoyle*, 3 Sim. 499; *Matthew v. Bowler*, 6 Hare, 110; *Sugd. V. & P.* 676,

ed. 14.

(*u*) *Elliott v. Edwards*, *Mackreth v. Symmons*, *supra*; *Gibbons v. Braddall*, 2 Eq. Ca. Abr. 682, M. N.; *Walker v. Preswick*, 2 Ves. 622; *Belt's Sup.* 427; *Cator v. Pembroke*, 1 Bro. C. C. 301.

(*x*) *Winter v. Lord Anson*, 1 Sim. & St. 445.

(*y*) *Linden, Exp.*, 1 M. D. & De G. 428; 10 L. J., N. S., Bkcy. 22.

(*z*) *Walker v. Ware, &c. Rail. Co.*, L. R., 1 Eq. 195; *Bishop of Winchester v. Mid-Hants Rail. Co.*, L. R., 5 Eq. 17; *Wing v. Tottenham, &c. Rail. Co.*, L. R., 3 Ch. 740.

(*a*) *Eyton v. Denbigh, &c. Rail. Co.*, L. R., 7 Eq. 439.

money (*b*); and it will pass to the assignee of the vendor, though he claim only by parol assignment (*c*). But it does not extend to the costs of the statutory arbitration, although they be payable by the company (*d*); nor does it give the vendor a security for his costs upon the sum deposited by the company, under sect. 85 of the act, when the condition of the bond has been performed (*e*).

195. The principle upon which a lien is raised in the case of vendor and purchaser, upon non-payment of the purchase-money, by mistake or for the convenience of the purchaser, does not apply (*f*) where the vendors, being known by the purchaser to be trustees, the purchaser leaves part of the purchase-money in the hands of one of them under his absolute control, and without the concurrence of the co-trustees or the cestuis que trust.

196. If purchase-money be paid prematurely, the purchaser or sub-purchaser will also have a lien on the estate (*g*); and when the purchaser properly declines to complete, there is a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments (*h*), and for his costs of a suit by himself or the vendor to compel performance of the contract (*i*). And so if the purchaser have resold before completion, the sub-purchaser will have a lien for what he has paid upon the interest which the original purchaser has acquired by part payment of the purchase-money (*k*). After the completion of the purchase an evicted purchaser has no lien on the purchase-money, though it be earmarked, as against an assignee

(*b*) *Walker v. Ware, &c. Rail. Co.*, L. R., 1 Eq. 195.

(*c*) *Dryden v. Frost*, 3 Myl. & Cr. 670; and see *White v. Wakefield*, 7 Sim. 401.

(*d*) *Ferrers v. Stafford, &c. Rail. Co.*, L. R., 13 Eq. 524.

(*e*) *Stevens, Exp.*, 2 Ph. 772; 13 Jur. 2; *Neath and Brecon Rail. Co., Re*, L. R., 9 Ch. 263.

(*f*) *White v. Wakefield*, 7 Sim. 417.

(*g*) Per Sir Thomas Clarke, M. R.,

Burgess v. Wheate, 1 W. Bl. 150; and see 15 Ves. 345; 2 Sugd. V. & P. 857, ed. 11.

(*h*) *Rose v. Watson*, 10 Jur., N. S. 297; 33 L. J., Ch. 385; 10 H. L. C. 672; *Wythes v. Lee*, 3 Drew. 396.

(*i*) *Middleton v. Magnay*, 2 H. & M. 233; *Turner v. Marriott*, L. R., 3 Eq. 744.

(*k*) *Aberaman Ironworks v. Wickens*, L. R., 4 Ch. 101.

of the fund for valuable consideration without notice; but it seems to have been thought that his lien would have prevailed against the vendor (*l*).

The purchaser's lien however only exists absolutely where the vendor is owner in fee of the estate. Where he is a mortgagee selling under a power of sale, it does not exist against the mortgagor, but only against the mortgagee to the extent of his interest in the estate. And it is said that if he be only a trustee it may affect the interests of his cestuis que trust (*m*). The lien will not arise if the object of the purchase be an illegal undertaking (*n*), or if the purchaser have through his own default abandoned the contract (*o*): and a like consequence ensues as to the lien of the vendor where the contract has gone off by his default (*p*) (1353).

Of Partnership Liens.

197. The separate share or interest of each of several partners, being only that which remains after the discharge of all liabilities to which the joint property is subject, and every assignment of or execution against the partnership estate, in respect of the private debt of any partner, being subject to those liabilities (*q*), it follows that, on the dissolution of the partnership by the death, bankruptcy, or retirement of a partner, the retiring partner, the assignees of the bankrupt, or the representatives of the deceased, and conversely the solvent or continuing partners, have a lien at law, as well as in equity, on the partnership estate for the satisfaction of all demands arising out of the joint business prior to the dissolution (*r*); or for allowances or payments agreed to be made upon the dissolution (*s*) to the person claiming the lien. And if one partner draw a bill in the name of the firm to secure his

(*l*) *Cator v. Earl of Pembroke*, 1 Bro. C. C. 301; 2 id. 282.

(*m*) *Wythes v. Lee*, *supra*.

(*n*) *Ewing v. Osbaldeston*, 2 Myl. & Cr. 88.

(*o*) *Dinn v. Grant*, 5 De G. & S. 451.

(*p*) *Oxenham v. Esdaile*, 2 Y. & J. 493; 3 id. 262; *Esdaile v. Oxenham*, 3 B. & C. 225.

(*q*) *Taylor v. Fields*, 4 Ves. 398.

(*r*) *West v. Skip*, 1 Ves. 239, 456; *Skip v. Harwood*, 2 Sw. 586; *Williams, Exp.*, 11 Ves. 3; *Harvey v. Crickett*, 5 M. & S. 336; per Parke, B., in *Hague v. Dandeson*, 2 Exch. 741.

(*s*) *Rowlandson, Exp.*, 2 Ves. & B. 172.

separate debt, the separate estate of the other partner will have a lien against the share of the surplus of the joint estate belonging to the drawer of the bill (*t*).

198. This lien, which holds good against the representatives and trustee in bankruptcy of the continuing partners (*u*), has been distinguished (*x*) from the ordinary lien or mortgage upon stock in trade (**444**), on the ground that the latter binds the stock in trade through all its changes; not preventing the sale of old and the acquirement of new stock, but subsisting upon the constantly changing stock as it may exist from time to time: whereas the lien, which arises in partnership matters, is a right to the property in the thing itself, preventing the sale of the existing stock without the consent of the executors of the surviving partner, and not extending to stock subsequently purchased. This distinction, however, seems to be contrary to the view taken of the nature of the lien by Lord Hardwicke, the correctness of which appears to be well established; for he, also referring to the effect of a mortgage of stock and goods in trade, held in two cases (*y*), which arose out of the same transactions, that the lien of a partner on dissolution was not appropriated (i. e., limited) to the stock brought in, but extended to every thing coming in lieu during the continuance or after the determination of the partnership.

The lien is no longer available after the continuing partner has *bonâ fide* assigned the property to a purchaser for value (*z*). It has been said that the right of a retiring partner cannot be higher than if there had been in the continuing partner an express trust to sell and apply the proceeds in payment of the partnership debts, in which case the purchaser would not be bound to see to the application of the purchase-money. Upon this principle it seems that a *bonâ fide* sale at any time would bar the lien; but in the case cited (*a*) six years had elapsed

(*t*) *King, Exp.*, 17 Ves. 115.

(*u*) *Stocken v. Dawson*, 9 Beav. 239.

(*x*) *Payne v. Hornby*, 25 Beav. 280; 4 Jur., N. S. 446.

(*y*) *Skip v. Harwood*, 2 Sw. 586, 588; *West v. Skip*, 1 Ves. 239, 244; *Belt's Sup.* 130, 199; and see in *Pennell v.*

Deffell, 4 De G., M. & G. 388, observations of Turner, L. J.

(*z*) *West v. Skip*, 1 Ves. 339; *Campbell v. Mullett*, 2 Sw. 575.

(*a*) *Langmead's Trusts*, In re, 20 Beav. 20; affirmed on the same and other grounds, 7 De G., M. & G. 353.

- since the dissolution, an interval after which a purchaser might reasonably suppose that all debts had been barred or paid.

And even where on a dissolution the partnership property has been assigned (*b*) to the continuing partner, and he has undertaken to pay the debts and to indemnify the retiring partner against them, or the property has been specifically divided between the late partners (*c*), the lien is at an end.

199. The lien extends to mining property (*d*), and to all other real and personal estate which is vested in the partners, for the purposes of the partnership, as joint tenants; and therefore to those joint purchases of real estate, in which, by reason of the advance of the price by the purchasers in unequal shares (*e*), or of expenditure of money by one of them in repairs or improvements (*f*), the transaction may be treated as in the nature of a partnership, i. e., in which a profitable return of the outlay is expected; as distinguished from a mere joint occupation not of that character, though arising under a joint ownership (*g*), or a transaction in which there is not a joint adventure (*h*).

200. It does not arise as to property which is held in common by part owners. Upon a share in a ship (which is generally so held) there is therefore no lien in favour of the owners of the other shares in respect of advances for outfit and for their share of freight (*i*), though the shares of the freight or earnings are so liable, and cannot be claimed until payment of the due proportion of advances for outfit and expenses (*k*). Nor has a partnership firm any lien upon the

(*b*) *Ruffin, Exp.*, 6 Ves. jun. 119;
Brundekin, Exp., 2 M. D. & De G. 704.

(*c*) *Lingen v. Simpson*, 1 Sim. & St.
600.

(*d*) *Fereday v. Wightwick*, 1 R. & M.
45.

(*e*) Per Lord Hardwicke, in *Rigden v. Vallier*, 2 Ves. 256.

(*f*) *Lake v. Gibson*, 1 Eq. Ca. Abr.
291.

(*g*) *Kay v. Johnston*, 21 Bear. 536.

(*h*) *Gemmell, Exp.*, 3 M. D. & De
G. 198.

(*i*) *Young, Exp.*, 2 Ves. & B. 212;
Harrison, Exp., 2 Rose, 76.

(*k*) *Holderness v. Shackels*, 8 B. &
C. 612, *Danson & Ll. Merc. Ca.* 201;
Green v. Briggs, 6 Hare, 395; 17 L. J.,
Ch., N. S. 323.

separate interest in it of one of the partners in respect of a debt not arising out of a partnership transaction (*l*).

201. As it is only on the dissolution of the partnership that the equity arises against the partnership estate, no lien accrues (in the absence of a special contract) to a company against the shares of a proprietor for a debt due from him to the company, where the shares are transferable like stock, subject only to the approval by the company of the transferee; the transfer working no dissolution and the shareholder in such a case being considered as a stranger as to his borrowing from the company (*m*). An express stipulation in the deed of settlement, notice of which is endorsed on the share certificates, that the company shall have a lien on the shares of proprietors who are customers of and indebted to the company, and that the shares shall not be transferred without the consent of the directors, will prevail against the bankruptcy trustee of a shareholder possessed of the certificates, the directors being able to refuse their consent to the transfer (*n*); though, where the shareholder has full power to transfer, the shares will pass to the trustee (*o*). An agreement, which gives a lien to a company on the shares and stock of a shareholder, also gives a lien on the dividends (*p*).

202. The benefit of the lien is carried on to creditors of the partnership, who, although before the dissolution they have no lien at law or in equity against the partnership effects, nor any right but that of suing and taking out execution (*q*), are entitled after dissolution, by virtue of the equities between the partners themselves, and so long as those equities subsist (but by no other right), to obtain satisfaction of their claims out of the partnership estate (*r*). Where the dissolution has been

(*l*) Per Lord Hardwicke, *Ryall v. Rowles*, 1 Ves. 374; *Meliorucchi v. Royal Exchange Ass. Co.*, 1 Eq. Ca. Abr. 8.

(*m*) *Pinkett v. Wright*, 2 Hare, 120; 12 Cl. & F. 764.

(*n*) *Plant, Exp.*, 4 D. & C. 160. See also *Deering v. Hibernian Banking Co.*, 16 W. R. 578.

(*o*) *Nelson v. London Assurance Co.*, 2 Sim. & St. 292.

(*p*) *Hague v. Dandeson*, 2 Exch. 741.

(*q*) Per Lord Eldon, 6 Ves. 126.

(*r*) *Rowlandson, Exp.*, 2 V. & B. 172; *Kendall, Exp.*, 17 Ves. 514; *Stuart v. Ferguson, Hayes, Jr. Ex. R.* 452; per Joy, C. B., *Ruffin, Exp.*, 6

caused by death, the assets of the deceased partner are equally liable with the estate of the survivor, and may be resorted to without regard to the state of the accounts (*s*) between the deceased and the surviving partners, and it is open to the creditor, if he think fit, to resort in the first instance to the deceased partner's assets, leaving his representatives to recover against the survivor (*t*).

The equity of the creditor, being only founded upon the partnership relation, was held not to arise against the estate of a deceased partner in respect of debts incurred by a surviving partner while carrying on the business and claiming to be absolute owner of the whole estate (of which he was afterwards held to be a trustee), and not under the authority of the representative of the deceased, who was never in the situation of a partner with the trustee (*u*).

203. The mere payment of interest on the debt, after the death of one of the partners, by the surviving members of the firm as such, will not prevent the running of the Statute of Limitations against the debt as to the estate of the deceased partner, though one of the survivors was the executor of the deceased (*x*). And the estate of the latter may be released by the acceptance by the creditor of the survivors as his debtors (*y*).

Of Agency Liens.

204. An agent who has advanced money, or incurred liability on account of his principal, is protected by a lien on the property in respect of which the advances were made or on the produce of the sale of it. An army agent, therefore, in respect of his advances to an officer for his outfit, had a lien on the purchase-money of his commission (*z*); and a person,

Ves. 119; *Campbell v. Mullett*, 2 Sw. 575.

(*s*) Per Lord Eldon, *Vulliamy v. Noble*, 3 Mer. 593; *Devaynes v. Noble*, 2 R. & M. 495.

(*t*) *Wilkinson v. Henderson*, 1 M. & K. 589.

(*u*) *Stocken v. Dawson*, 9 Beav. 239; affirmed, 8 Feb. 1848.

(*x*) *Way v. Bassett*, 5 Hare, 55; see *Harris v. Farwell*, 13 Beav. 403; 15 id. 31.

(*y*) *Brown v. Gordon*, 16 Beav. 302.

(*z*) *Lawrie v. Banks*, 4 Jur., N. S. 299.

who has carried on trade for another; upon the stock and debts: of which he may restrain the bankruptcy trustee of his principal from taking possession (*a*). An agreement that the lender of money shall be employed to sell and shall be repaid out of the proceeds of goods expected to be purchased, there being no contract for the purchase of such goods, will not however give him a lien upon goods which are afterwards purchased and sent, but were not paid for with the money advanced (*b*) (315).

Of Liens for Expenditure upon the Property of another, and herein of Salvage Liens and Liens upon West India Estates.

205. As a general rule there is no lien in favour of a person merely because his money has been expended on property in which he has no interest, or for the benefit of another.

No such right therefore belongs to a tenant in common against the share of his co-tenant for payments in respect of the estate (*c*); nor to one joint owner for money lent to another (*d*), except it be in the nature of a partnership transaction (199); nor to a firm against property purchased by one of the partners and paid for out of partnership money (*e*); nor to a person who has laid out money on property which he has bought without a title (*f*); nor to a solicitor who has lent money in the name of his client, who is an executor, to pay off a debt on the testator's estate (*g*); nor to a guardian who has discharged an incumbrance on the infant's estate (*h*).

But it is otherwise as to persons who have laid out money upon property under a mistaken belief that they are entitled to or interested in it; or on the faith of a contract for an interest therein: a lien has therefore been allowed (*i*) to a husband for

(*a*) Foxcraft v. Wood, 4 Russ. 487; and see Bristow v. Whitmore, 9 H. L. C. 391; Tooth v. Hallett, L. R., 4 Ch. 242.

(*b*) Deane v. Byrnes, 13 W. R. 299; 3 Mo. P. C., N. S. 91.

(*c*) Young, Exp., 2 Ves. & B. 242, notwithstanding Doddington v. Hallet,

1 Ves. 497; Leslie, Exp., 3 L. J., N. S. Bkcy. 4.

(*d*) Kay v. Johnston, 21 Beav. 536.

(*e*) Walton v. Butler, 29 Beav. 428.

(*f*) Ridgway v. Roberts, 4 Hare, 106.

(*g*) Christian v. Field, 2 Hare, 177.

(*h*) Hooper v. Eyles, 2 Vern. 479.

(*i*) Neesom v. Clarkson, 4 Hare, 87.

purchase-money paid by him under the mistake that in right of his wife he was entitled to the benefit of her contract for purchase,—in substitution for the vendor's lien which he discharged,—and also a lien for the cost of substantial improvements made under the same mistake. And so where a person had laid out money upon property purchased from a remainderman upon the faith of a representation that the tenant for life would concur in the sale, which he afterwards refused to do (*a*). And in the case of an agreement for a lease providing that the tenant should improve and should be repaid in case the lease was not granted, the tenant had a lien for his expenditure on the interest of the person with whom he made the agreement (*b*). But if money be expended on improvements in consideration of the granting of a lease at an additional rent, the tenant or his assignees rejecting the lease cannot claim a lien for the expenditure (*c*).

If the personal estate of a lunatic have been applied in discharge of a mortgage upon his real estate, a lien upon the latter will be allowed to his next of kin, because the nature of a lunatic's estate cannot be changed as between his real and personal representatives (*d*).

206. A lien is also given for expenditure upon property where the owner has allowed the person who has laid out the money to do so in the expectation that he will receive the benefit of it. As where a father allowed his sons the use of land for their business without making any agreement as to the terms of the occupation, and they expended large sums in building, and also supplied the father with goods in respect of his outlay in building before their occupation; a lien was allowed both for their own expenditure and for the value of the goods supplied (*e*).

Here the value of the land was small compared with the outlay, and the latter was far more than a reasonable compensation

(*a*) *Ludlow v. Grayall*, 11 Price, 58.

(*d*) *Weld v. Tew*, Beat. 266.

(*b*) *Middleton v. Magnay*, 2 H. & M. 233.

(*e*) *Unity Bank v. King*, 25 Bear.

72.

(*c*) *Ladd, Exp.*, 3 D. & C. 647.

for the value of the occupation. But where these conditions were reversed, as where a father allowed his son-in-law to live in his house rent free for many years, the latter was denied a lien for his outlay in repairs, and for the renewal of a small part of the building; and it was said that in such a case there was an implied contract to keep the premises in repair, and that the extraordinary expenditure incurred was not of itself enough to support the claim (*f*).

207. A person who has agreed to advance money for the purposes of an undertaking has no lien for his advances unless he has entirely fulfilled his agreement: and he cannot claim a share of the profits proportioned to his advance (*g*). And a statement in the prospectus of a company, that deposits will be returned if no allotment of shares be made, will not create a lien in respect of deposits paid to the credit of the company (*h*).

208. The lien is also allowed in respect of advances in the nature of salvage (1060), viz., such as are made for the redemption of property, for renewal fines, or other payments made by way of salvage; for then, whether he who pays the money fills the character of a trustee, joint tenant, tenant for life, or mortgage or other creditor, and even though if he claim to be a creditor his debt is disputed (*i*), he has a lien on the estate or interest of the person for whose benefit the payment was made in the property discharged. And the right of a tenant for life is the same whether the trustees of the settlement could or could not have raised the money by other means (*k*). A married woman who, out of her separate estate, has paid the premiums on policies effected as a provision under her marriage settlement, is also entitled to such a lien (*l*). And so is the

(*f*) *Millard v. Harvey*, 10 Jur., N. S. 1167.

(*g*) *Twynam v. Hudson*, 8 Jur., N. S. 685; 4 De G. F. & J. 462.

(*h*) *Moseley v. Cressey's Co.*, L. R., 1 Eq. 405.

(*i*) *Manlove v. Bale*, 2 Vern. 84; *Lacon v. Mertins*, 3 Atk. 4; *Hamilton*

v. Denny, 1 Ba. & Be. 199; *Jones v. Jones*, 5 Hare, 465; *Fetherstone v. Mitchell*, 9 Ir. Eq. Rep. 480.

(*k*) *Todd v. Moorhouse*, L. R., 19 Eq. 69.

(*l*) *Burridge v. Row*, 1 Y. & C. C. C. 183.

assignee of a policy for premiums paid after the assignment, with interest from the dates of the several payments, as against persons who have established a prior interest in the policy (*m*). But the trustee of a policy who makes or obtains such advances can neither obtain nor create such a lien if he be, or in the due performance of his trust ought to be, in possession of funds applicable for the purpose (*n*). And the mortgagor himself, although, as a general rule, he cannot claim repayment of money laid out in the preservation of the security, has been held entitled to a lien for premiums which he continued to pay after his liability to do so had been determined by his bankruptcy (*o*).

209. Another class of equitable salvage liens arises in connection with certain undertakings, such as mines and alum works, by reason of the exigencies of which, and of the perishable nature of the works by which they are carried on, a lien is allowed to the manager, whether he be one of several part owners or otherwise, for the expenses incurred and the advances made in the working of them (*p*). Of this nature is the cultivation of West India estates, which cannot be carried on without the assistance of consignees and agents at home, and seldom without pecuniary or other supplies; for which, therefore, whether for the immediate purposes of the estate (*q*), or for the interest of incumbrances (*r*), a lien is allowed upon the estate independently of the lien which may arise from any particular course of dealing between the parties (*s*), provided the lien be not excluded by a contract

(*m*) *West v. Reid*, 2 Hare, 249; *Gill v. Downing*, L. R., 17 Eq. 316.

(*n*) *Clack v. Holland*, 19 Beav. 262.

(*o*) *Shearman v. British Assurance Co.*, L. R., 14 Eq. 4.

(*p*) Per Lord Eldon, in *Scott v. Nesbitt*, 14 Ves. 438; *Sayers v. Whitfield*, 1 Knapp, P. C. 133. Compare this right with the rights of incumbrancers, under charges made by managers of infants' estates by Hindoo law, *Hunoomanpersand Panday v. Mussumat Babooee Munraj Koonwreec*,

6 Moo. I. A. 393.

(*q*) *Scott v. Nesbitt*, *supra*; *Fraser v. Burgess*, 13 Moo. P. C. 314; 6 Jur., N. S. 827; *Sayers v. Whitfield*, *supra*. As to the limited liens subsisting by enactment in some of the West India Islands, see *Burge*, Col. Law, 3, 359; and see 14 Ves. 441.

(*r*) *Greathed, Re*, Cust's W. I. Incumbered Estates Acts, 219, ed. 2.

(*s*) See *Simond v. Hibbert*, 1 R. & M. 719.

which expressly defines and limits the nature and extent of the consignee's security (*t*) (1537).

The right is allowed as well to the manager of the estate abroad, where duly authorized, as to the consignee at home of the produce (*u*); and it will arise in favour of a manager, whether he be appointed by the owner or trustee of the estate, or by the Court of Chancery (*x*). Where the appointment is made by the court, in a suit properly constituted, it is made on behalf of all the parties interested, and the manager is entitled to his commission and allowances, and to a lien for the balance due to him, if not as manager, as the officer of the court, entitled to be repaid all advances and all expenses incurred in executing the trust under its authority (*y*).

210. No lien arises in favour of the owner himself of an incumbered estate, because it is presumed that he makes the advances for his own benefit in respect of the equity of redemption (*z*). And where the owner of an estate, subject to charges, has appointed a manager, no lien arises by virtue only of that appointment against the incumbrancers, whose title is prior to that of the owner, and who have nothing to do with the expenditure: but if the incumbrancers, or other persons interested, have so recognized the possession of the manager, that he can be considered as acting on their behalf and for their benefit, the same consequences will follow as if he had been appointed by the court; and they will not be allowed to dispute a lien for expenditure, which by their tacit acquiescence he has been encouraged to make (*a*). If, however, a mortgagee, not being in possession, be not a party to a suit in which the manager is appointed, or if he allow the mortgagor

(*t*) *Leith's Estate*, Re, *Chambers v. Davidson*, L. R., 1 P. C. 296; 4 Mo. P. C., N. S. 158.

(*u*) *Fraser v. Burgess*, *supra*; *Bertrand v. Davies*, 31 Beav. 429; 9 Jur., N. S. 34.

(*x*) *Scott v. Nesbitt*, *Bertrand v. Davies*, *supra*; *Daniel v. Trotman*, 1 Moo. P. C., N. S. 123; 9 Jur., N. S.

583; *Fraser v. Burgess*, per Lord Kingsdown.

(*y*) *Morrison v. Morrison*, 7 De G., M. & G. 214; *Fraser v. Burgess*, *supra*; *Farquharson v. Balfour*, 8 Sim. 210.

(*z*) *Greathead*, Re, *Cust's W. I. Incumbered Estates Acts*, 235, ed. 2.

(*a*) *Fraser v. Burgess*, *Bertrand v. Davies*, *supra*; *Morrison v. Morrison*, 2 Sm. & G. 564.

to manage the estate and receive the produce, he will not be bound by the previous management (*b*). He cannot have an account of the past produce, and is not bound by the costs of management subsequent to the mortgage (1491).

211. The lien of the manager only affects the interest of the person who appoints him; and after notice from the remainderman, the manager can only hold as mortgagee in possession under his existing lien, or adversely to the owner; in which case he cannot claim a lien for the expenses of management. But a lien will arise in respect of supplies made for the use of the crops which were produced next after the death of the tenant for life (*c*). And the tenant for life himself has a lien upon the inheritance for necessaries supplied (*d*).

If the estate be managed by the court, the consignee's claim will be admitted against every fund arising therefrom, which is under the control of the court; whether the fund was realized before or after the discharge of the consignee, and although it was realized before the mortgagee was made party to the suit, the mortgagee's interest having been the same throughout, and the expense of keeping up the estate being a liability to which he was always subject, and which he cannot evade by leaving the management to the court (*e*).

But the consignee's claim against the corpus is admitted only on the final settlement of accounts upon his discharge, and pending the consigneeship he cannot come to the court whenever a balance is due to him for payment out of the estate (*f*).

If he require payment when his discharge has not been already ordered, he must therefore pray that he may be discharged, and may pass his final accounts, and that so much as is necessary of the fund in court, representing the corpus, may be paid him in discharge of the balance to be found

(*b*) *Bertrand v. Davies*, 31 Beav. 429; 9 Jur., N. S. 34.

(*c*) *Ibid.*

(*d*) Per Lord Eldon, *Scott v. Nesbitt*, 14 Ves. 442.

(*e*) *Morrison v. Morrison*, 2 Sm.

& G. 564; 7 De G., M. & G. 214; *Lyne v. Thompson*, 30 Beav. 542; *Tharp, Re*, 2 Sm. & G. 578.

(*f*) *Farquharson v. Balfour*, 8 Sim. 210.

due, and for his costs: and for the purpose of thus praying for his discharge, he may be allowed to amend his petition (*g*).

212. The lien extends to all payments made by the consignee on account of charges on the estate, or under the orders of the court (*h*); and interest at £4 per cent. will be allowed as compensation for the delay in payment (*i*); and in the absence of *mala fides* the lien will not be affected by the injudicious or wasteful management of the manager appointed by the consignee (*k*).

It has been held that a trustee of the estate who has acted as consignee may enjoy a lien for his advances; but it seems that he cannot for commission (*l*).

213. Persons who have paid money in discharge of insurances, upon property which has been destroyed or injured, have also a lien upon whatever is received by the owner in the form of salvage. The money received by the owner of a damaged ship, from the person responsible for the damage, is therefore liable to the insurer for what he has paid under his insurance; and the lien is extended in favour of the insurers of ships captured by an enemy, to such as are taken by their owners by way of reprisal; and to money paid to the owners by the Crown under a commission for the distribution of prizes (*m*).

*Of the Liens of Trustees for Expenditure and for the
Security of Property subject to Trusts.*

214. A trustee has a lien on the trust estate for money properly expended thereon (*n*); and where the director of a company made advances to complete a purchase and for other

(*g*) *Morrison v. Morrison*, 2 Sm. & G. 564.

(*h*) *Shaw v. Simpson*, 1 Y. & C. C. C. 732.

(*i*) *Morrison v. Morrison*, *supra*.

(*k*) *Harriott, Re*, Cust's W. I. Incumbered Estates Acts, 271, ed. 2.

(*l*) *Harriott, Re*, *supra*; 8 L. T., N. S. 854.

(*m*) *White v. Dobinson*, 14 Sim. 273; *Randal v. Cockran*, 1 Ves. 98; *Blaauwpot v. Da Costa*, 1 Ed. 180.

(*n*) *Darke v. Williamson*, 25 Beav. 622; 4 Jur., N. S. 1009.

proper purposes of the company, the lien was allowed (*o*), although the conveyance recited that the payment was made with money belonging to the company. But trustees can have no lien for costs or expenditure incurred in breach of their trust, at least as against the shares of those of their cestuis que trust who have not actively induced them to commit the breach of trust, or whose interest in their shares is inalienable (*p*).

Where all parties are ordered to be paid their costs out of a fund, an executor is not deprived of his lien by complying with an order to pay the fund into court (*q*).

215. For the security of the trust fund itself, if the trustee permit the cestui que trust to receive and apply it in the purchase of other property, or if he advance it to him for the purpose of investment (*r*), or if it be improperly invested (*s*), a lien will also arise. So if part of the trust fund be advanced to the cestui que trust, the advance may be set off in accounting for his share (*t*). And if the executor himself be indebted to the testator's estate, there will be a lien against his interest under the will in preference to the right of a mortgagee of the executor (*u*). And generally, where money subject to trusts is applied in the purchase or improvement of property, into which it can be traced by sufficient evidence, there will be a lien for it upon that property (*x*). The equity will therefore arise where a husband, having acquired possession of a settlement fund upon his undertaking to lay it out according to the trusts (*y*), or of the wife's separate estate (*z*), with the intention or under a promise to invest it for her benefit, has applied it in a purchase in his own name. And where the fund was held

(*o*) *Imperial Salt and Alkali Co., Re*, 2 W. R. 122.

(*p*) *Leedham v. Chawner*, 4 K. & J. 458.

(*q*) *Blenkinsopp v. Foster*, 3 Y. & C. 207.

(*r*) *Price v. Blakemore*, 6 Beav. 507; *Birds v. Askey*, 24 Beav. 618.

(*s*) *Mant v. Leith*, 15 Beav. 524.

(*t*) *Makins, Exp.*, 2 M. D. & De G. 508.

(*u*) *Cole v. Muddle*, 10 Hare, 186.

(*x*) *Lane v. Dighton*, Amb. 409; *Williams v. Thomas*, 2 Dr. & Sm. 29; 8 Jur., N. S. 250; *Harford v. Lloyd*, 20 Beav. 310; *Phayre v. Peree*, 3 Dow, 116.

(*y*) *Lane v. Dighton*, *supra*; *Att.-Gen. v. Whorwood*, 1 Ves. 534; *Wilson v. Foreman*, cited and explained, 10 Ves. 519.

(*z*) *Darkin v. Darkin*, 17 Beav. 579; *Scales v. Baker*, 28 Beav. 91.

upon trust for the husband and wife during their joint lives, and for the survivor absolutely, money expended by the husband shortly after the marriage was assumed under the circumstances to have been taken from the capital of the fund, and the wife surviving was held to have a lien for the amount (*a*).

The lien may arise in the simple case where one person has laid out the money of another in a purchase, as well as where the purchaser is a properly constituted trustee (*b*); but against no person who becomes possessed of the fund will any equity exist, unless it can be shown that the money invested was the actual fund which is subject to the trust, for otherwise there is no room for the presumption (*c*), upon which the relief is granted, that the purchase was made in the execution of the trust. The advance must also have been of such a kind that the trust does not cease with it. Trust money advanced to an infant in the *bonâ fide* exercise of a power of advancement cannot be followed, though it be not applied to the purpose for which the advance was intended (*d*).

216. The effect of the investment in real estate of personalty which is subject to a trust, is to create a lien on the estate for the amount invested; and if the money be clearly shown to have been applied in the purchase, it is not material that it was applied indirectly; as in the repayment of money borrowed for the immediate purchase-money (*e*). The purchased estate cannot be claimed as belonging to the trust, but the lien may prevail to that extent also, if it be shown that there was an intention between the persons interested

(*a*) *Williams v. Thomas*, 2 Dr. & Sm. 29; 8 Jur., N. S. 250.

(*b*) *Ryal v. Ryal*, Anbl. 413; *Balguy v. Hamilton*, id. 414.

(*c*) *Perry v. Phelps*, 4 Ves. 107; 17 id. 173. It seems to have been on account of the want of room for this presumption that where a tenant for life by fraud procured a fine to be levied, and sold and made investments which could be identified, no specific lien was held to arise on the investments. The reason given is, that no

agreement had been made so as to make this particular fund answerable. A general charge was however allowed against the estate of the tenant for life. (*Newcomb v. Burdon*, 2 Anst. 343.)

(*d*) *Lawrie v. Banks*, 4 Jur., N. S. 299.

(*e*) *Lewis v. Madocks*, 8 Ves. 150; 17 id. 48; *Williams v. Thomas*, 2 Dr. & S. 29; 8 Jur., N. S. 250; *Hopper v. Conyers*, L. R., 2 Eq. 549.

that the property purchased should be substituted for the money (*f*).

217. The lien may also be fixed upon other property of the person who has received the fund.

Thus the trustees of a will who had wrongly paid over trust monies were held (*g*) entitled to a lien for it against the interest of the recipients in other property which was subject to the trusts, even as against assignees for valuable consideration. And where a married woman, entitled to a life interest in stock under one settlement, and to a life rent-charge on real estate under another, fraudulently appropriated the stock, the rent-charge was held liable to make it good as against an assignee with notice of the fraud (*h*).

218. If mortgagors, empowered to raise money for a special purpose, apply it in excess of their power in the discharge of prior mortgages upon the same and other property, the sum so misapplied is considered as trust money in the hands of the mortgagors, applicable specifically to the payment of the mortgage debts created under the power; and there is a lien on the property which was subject to the paid-off mortgages for the amount applied (*i*).

219. For money or other property in the hands of a factor or broker for a special purpose, there is also a lien in the nature of a trust, in favour of the person by whom it was delivered or paid, as a corollary of the rule that the person intrusted therewith for the special purpose has no lien thereon; and this equitable right is fully recognized by courts of law, independently of any actual possession of the fund. Hence if goods be intrusted to a factor for sale, and at the time of his death or bankruptcy they remain in specie; or having been sold, the proceeds have either not been received by the factor, or have been employed in the purchase of other goods or re-

(*f*) *Wadham v. Rigg*, 10 W. R. 365; and cited 2 Dr. & S. 34.

(*g*) *Dibbs v. Goren*, 11 Beav. 483.

(*h*) *Woodyatt v. Gresley*, 8 Sim. 180.

(*i*) *Trevilian v. Mayor of Exeter*, 18 Jur. 1019; 5 De G. M. & G. 828.

invested, and the investments or goods can be identified as the produce of that particular money, the principal is entitled; and if not already in possession may enforce his right either at law or in equity (*k*).

And bills in the hands of a banker are like goods in those of a factor: if deposited for a special purpose with the banker or his agent, either before or after, but without notice of the bankruptcy, the property of the original owner is not divested; and if the banker's assignees allow the agent to retain such bills in satisfaction of his own lien, they having received the same advantage as if the agent had remitted the amount, must make it good to the depositor (*l*).

But if, in the case of a factor, he have already received the proceeds arising from the sale of the goods (*m*), or if bills deposited, being indorsed, have been negotiated (*n*) without notice of the title of the true owner, the right of the consignor of the goods or of the depositor of the bills is at an end, and he has no claim against the person by whom the possession has been acquired; the possession and property under such circumstances being inseparable. If by the indorsement the bills be made payable to the agent for the account of the principal, it will be sufficient notice of the principal's title (*o*).

220. Where a debtor deposits deeds as security for his debt, and afterwards, having access to the place of deposit, he withdraws them without the consent of the creditor, the latter has a lien on all the deeds belonging to the debtor at the time of the deposit; and it is immaterial whether the deeds were left in the debtor's custody as the solicitor of the creditor, or otherwise, or whether the abstraction of the deeds was accidental or improper (*p*).

(*k*) *Whitecomb v. Jacob*, 1 Salk. 160; *Scott v. Surman*, Willes, 400; *Sayers, Exp.*, 5 Ves. 169; *Taylor v. Plumer*, 3 M. & S. 562; *Hassall v. Smithers*, 12 Ves. 119; *Giles v. Perkins*, 9 East, 13.

(*l*) *Cunningham, Exp.*, 3 D. & C. 58.

(*m*) *Scott v. Surman*, *Whitecomb v. Jacob*, *supra*.

(*n*) *Bolton v. Puller*, 1 Bos. & P. 546; *Collins v. Martin*, *id.* 648.

(*o*) *Trenttel v. Barandon*, 8 Taunt. 100.

(*p*) *Mason v. Morley*, 11 Jur., N. S. 459; 34 Beav. 475.

221. Where an estate has been wasted by a person who has but a limited interest in it, a lien arises for the amount of the injury against the profits received in his time in favour of the remainderman, and that against the incumbrancers of the person who committed the waste, though claiming under securities made before it was committed (*q*).

222. A landlord who neglects to distrain has no lien for his rent upon the proceeds of the sale of the chattels which he might have seized. And it is no excuse for his negligence that the property was in the possession of a receiver appointed by the Court; his proper course in such a case being to issue his distress and lodge it with the sheriff, and then to apply to the Court for leave to enforce it (*r*).

*Of the Lien of Solicitors upon the Fruits of Judgments
and Decrees.*

223. By a practice, which was said by Lord Mansfield (*s*) to be not very antient, solicitors are entitled, both at law and in equity, not only to a general lien for their charges upon documents in their hands belonging to their clients; but also to a particular lien (*t*), upon the fruits of a judgment or decree obtained by the client in the suit in which the solicitor was employed, for his costs in that suit. The former of these rights, depending upon the actual possession of the documents, will be considered in that part of the subject which relates to possessory liens (**295**); the latter, purely of an equitable character, though always recognized and enforced as fully at law as in equity, is now to be treated of as a lien not depending upon possession.

224. A solicitor is entitled to a lien upon the interest of his client in a fund which has been recovered or protected by his exertions, for the costs incurred, and the lien is as

(*q*) *Briggs v. Earl of Oxford*, 1 Jur., N. S. 817.

(*r*) *Sutton v. Rees*, 9 Jur., N. S. 456;
33 L. J., N. S., Ch. 487.

(*s*) In *Wilkins v. Carmichael*, Dougl. 101.

(*t*) *Welsh v. Hole*, Dougl. 238.

applicable to money awarded to the client by an arbitrator, or payable to him under a compromise, as to that which he recovers by virtue of an adverse judgment (*u*); and also to the property dealt with under the decree in an ordinary administration suit, though it should turn out that the client himself takes no interest in the property (*x*).

But whether by judgment or by compromise, the fund must have been secured by the diligence of the solicitor, who therefore cannot claim, by virtue of it, the costs which he has paid, of a former solicitor in the cause (*y*).

In equity, where a decree is as much for the benefit of the defendant as of the plaintiff, the solicitor of the former, as well as of the latter, enjoys the lien (*z*).

225. It extends only to the costs of the particular matter, or of a matter immediately connected therewith (*a*); but where an action was brought at law, and the defendant commenced a suit in equity to assist his defence, in which he was ordered to pay a sum of money to the plaintiff at law, the fund was considered to have been recovered by means of the original action, and the attorney of the plaintiff at law was held entitled to the lien (*b*).

226. As to funds not administered in court, the solicitor employed by a trustee has no lien upon the trust fund, though the trustee himself may retain his costs (*c*). But he generally has a limited lien upon his client's money actually in his hands (*d*); and upon money which has been placed in his hands to abide the event of a litigation, when his client

(*u*) *Ormerod v. Tate*, 1 East, 464; *Cowell v. Betteley*, 4 M. & S. 265; 10 Bing. 432; *Davies v. Lowndes*, 3 C. B. 823; *Verity v. Wyld*, 4 Dr. 427.

(*x*) *Lloyd v. Mason*, 4 Hare, 132; *Bailey v. Birchall*, 2 H. & M. 371; the latter case under 23 & 24 Vict. c. 127 (227).

(*y*) *Irving v. Viana*, 2 Y. & J. 70; and see *Townsend v. Reade*, 4 L. J., N. S., Ch. 233.

(*z*) *Townsend v. Reade*, *supra*.

(*a*) *Bozon v. Bolland*, 4 M. & C. 354; *Lann v. Church*, 4 Mad. 391; *Hall v. Laver*, 1 Hare, 571; per Lord Langdale, in *Lucas v. Peacock*, 9 Beav. 177; see *Stephens v. Weston*, 3 B. & C. 535; 5 D. & R. 399.

(*b*) *Simpson v. Prothero*, 3 Jur., N. S. 711.

(*c*) *Worrall v. Harford*, 8 Ves. 4.

(*d*) *Miller v. Attlee*, 3 Exch. 799.

has established his right to it (*e*); and this lien extends to the solicitor of a married woman in a matrimonial suit, who has a lien upon monies received by him on her account in the course of the suit; including alimony when she has allowed it to be received by the solicitor, to whom by the course of the court it cannot be paid without her consent in writing (*f*).

227. In every case (*g*) in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, the court or judge (who is the judge presiding in the branch of the court in which the litigation was or is pending (*h*), and who constitutes the court as distinguished from a judge at Nisi Prius (*i*)), before whom any such suit, matter or proceeding has been heard, or shall be depending, may declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding. And such court or judge may make such orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as shall appear just and proper. All conveyances and acts done, or which shall operate to defeat

(*e*) *Hanson v. Recce*, 3 Jur., N. S. 1204.

(*f*) *Bremner, Exp.*, L. R., 1 P. & D. 254.

(*g*) 23 & 24 Vict. c. 127, s. 28. This was enacted in consequence of the decision of the House of Lords in *Shaw v. Neale*, 6 H. L. C. 581, that a solicitor could have no lien for costs against real estate, at law or in equity, because there could be no lien upon property unless it is in the possession of the party who claims the lien; a proposition which entirely ignores the principle upon which liens are founded

in equity, under which jurisdiction the case arose. In *Baker v. St. Quentin*, 12 M. & W. 441, Parke, B., doubted (and the doubt has often been quoted) if the word *lien* were correctly applied to the right of the attorney against the fruits of a judgment. There seems, however, to be no reason for the doubt beyond the narrow meaning which was given to the word "lien" by the courts of law.

(*h*) *Heinrich v. Sutton*, L. R., 6 Ch. 865.

(*i*) *Wilson v. Hood*, 3 H. & C. 148.

such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. A garnishee order *ex parte* to attach a fund will not therefore prevail over the lien of the attorney of the judgment debtor who has previously taken out a summons for an order to charge his costs on the fund (*k*). It is also provided that no such order shall be made where the right to recover payment of such costs, charges and expenses is barred by any statute of limitations.

228. The right to a charge under the act may be declared where the client is a married woman, although the property be settled to her separate use without power of anticipation (*l*). The solicitor of the next friend of an infant plaintiff may by means of an action obtain a declaration of right to a lien for his costs (*m*); but it seems that he cannot get it under the act during the infancy (*n*), but must wait until the infant has attained majority and has adopted the proceedings; which, under the circumstances, he will be considered to have done by a slight interference; such as applying to discharge a receiver, and that he may pass his accounts (*o*).

229. Property is considered to have been "preserved," when on a liberal construction of the act the litigation has produced results favourable to the person who employs the solicitor (*p*); and the appointment of a receiver is sufficient for the purpose whether it be made adversely (*q*) or by consent (*r*); as is also the management of the estate and the due application of the rents in the suit (*s*). And when the suit has manifestly

(*k*) *Birchall v. Pugin*, L. R., 10 C. P. 397.

(*l*) *Keane, Re*, L. R., 12 Eq. 117.

(*m*) *Pritchard v. Roberts*, id. 17 Eq. 222.

(*n*) *Bonser v. Bradshaw*, 4 Gif. 260; 9 Jur., N. S. 1048. On appeal (10 W. R. 481), held that the application would not be heard unless it was sub-

stantially opposed on behalf of the infant.

(*o*) *Baile v. Baile*, L. R., 13 Eq. 497.

(*p*) *Philippine*, L. R., 1 A. & E. 309; *Scholefield v. Lockwood*, id. 7 Eq. 83.

(*q*) *Twynam v. Porter*, L. R., 11 Eq. 181.

(*r*) *Bailey v. Birchall*, 2 H. & M. 371.

(*s*) *Baile v. Baile*, *supra*.

been for the benefit of all parties, the solicitor of the plaintiff will be entitled to a lien on the whole property which is the subject of litigation, irrespective of the interest in it of his client, and although upon taking the accounts the client may be found a debtor to the estate (*t*); though it has been held otherwise where, as in the case of a tenant in tail who died without having barred the entail, the interest of the client in the property has ceased (*u*): as also where there was no proof of the recovery or preservation of any property except the making of a decree for administration, the appointment of a new trustee, and the bringing in of some accounts (*x*).

It was held that there was no preservation of property within the act, where, the suit being to restrain the client from so building as to obstruct ancient lights, part of the building in question was by agreement allowed to remain; and an easement being only something incident to property, it seems that no charge upon it is possible (*y*).

230. The right to the declaration extends to the personal representatives of the solicitor (*z*); and it may also be enforced after the death of the client, and after an order for sale of the property in a suit to administer his estate; but the order will not be extended to the costs of proceedings not included in the taxed costs, charges and expenses incurred in the suit (*a*).

A charge may be made (*b*), not merely in favour of a solicitor against his client, but also in favour of the London solicitor, for costs due from the country solicitor, for whom he has acted as agent, though the balance of such costs be not ascertained; and an inquiry may be directed to ascertain their amount.

For the purposes of the act, a cause heard at *Nisi Prius* is considered as having been tried by the court in which it was brought, and a charging order has been made by a common law court for common law costs, though the property was in

(*t*) *Bailey v. Birchall*, 2 H. & M. 371.

(*u*) *Berrie v. Howitt*, L. R., 9 Eq. 1.

(*x*) *Pinkerton v. Easton*, L. R., 16 Eq. 490.

(*y*) *Foxon v. Gascoigne*, L. R., 9

Ch. 654.

(*z*) *Baile v. Baile*, L. R., 13 Eq. 497.

(*a*) *Wilson v. Round*, 4 Gif. 416; 10 Jur., N. S. 34.

(*b*) *Tardrew v. Howell*, 3 Gif. 381.

course of administration in Chancery; the applicant not having come so late as to interfere with the distribution (*c*).

Apart from its application to real estate the statutory right is less extensive than that which was already enjoyed by the solicitor; for whereas his lien is an equitable right, which cannot be defeated by the client's assignment of the fund, or by any stop order obtained by the assignee (which equitable right remains unaffected by the act (*d*)), the assignment by the client to a bonâ fide purchaser for value without notice is not void against the statutory charge. Nor can that charge be obtained when the remedy for the costs is barred by the Statute of Limitations, by which neither the attorney's lien on a judgment (*e*) nor a possessory lien (*f*) is affected.

231. The lien of the solicitor being founded upon his equitable right against those who have the benefit of the fund which has been produced by his exertions, it binds the trustee in bankruptcy of the client, whether the action was brought before the bankruptcy, or by the uncertificated bankrupt after it (*g*); and if money be recovered by an administrator, it is bound by the lien, and he cannot controvert it by insisting upon applying the assets in a course of administration (*h*) nor can the benefit of an order for payment of costs to the client be released by him to the prejudice of the lien of his solicitor (*i*).

232. The right of the solicitor (*k*) entitled to the lien is, that the fund recovered shall not be paid to the client until the costs have been discharged. The right may be enforced by action, or may be protected by a stop order, where the fund

(*c*) *Seaman, Exp.*, 10 Jur., N. S. 592.

(*d*) *Haymes v. Cooper*, 33 Beav. 431; 10 Jur., N. S. 303.

(*e*) *Higgins v. Scott*, 2 B. & Ad. 413.

(*f*) *Spears v. Hartley*, 3 Esp. 81.

(*g*) *Jones v. Turnbull*, 2 M. & W. 601; *Bowden, Exp.*, 2 D. & C. 182.

(*h*) *Turwin v. Gibson*, 3 Atk. 720.

(*i*) *Bryant, Exp.*, 2 Rose, 237; 1 Mad. 49; *Anon.*, 2 Ves. 25; *Belt's Sup.* 275.

(*k*) See *Barker v. St. Quentin*, 12 M. & W. 441; 13 L. J., N. S., Ex. 144; per Parke, B., *Verity v. Wyld*, 4 Dr. 427; *Games, Exp.*, 3 H. & C. 294.

has been paid into court (*l*), and the lien has attached by means of an order that the costs shall be paid out of it (*m*), or the solicitor may retain his costs out of the fund, if it be already in his hands (*n*). It may also be enforced by an order of court, for payment of the costs by the person who becomes liable under the judgment (*o*). Where an order is made for payment of costs to the client, the solicitor is entitled to immediate payment out of the client's money in court, or out of the fruits of an execution in the hands of the sheriff, though the latter have notice to retain the fund, on the ground that the defendant intends to set aside the proceedings for irregularity (*p*).

233. This lien will not prevent the parties to a litigation from making a compromise, though the solicitor have given notice of his claim, whether the damages sought to be recovered are unliquidated (*q*), or the result of the proceedings doubtful (*r*); or where the damages are liquidated, unless it be shown that the arrangement was made collusively to deprive the solicitor of his costs (*s*). This rule is followed even where the plaintiff sues in formâ pauperis (*t*). But if collusion be shown, the court will not allow a release given by a pauper plaintiff to be pleaded, but will order it to be taken off the file (*u*). The solicitor, after the action has been bonâ fide settled without his intervention, or on his acceptance of an undertaking for the payment of his costs, cannot proceed with the suit for the mere purpose of recovering them (*x*).

Even if the person liable to pay the money should pay it to

(*l*) *Sympson v. Prothero*, 3 Jur., N. S. 711; *Hobson v. Shearwood*, 8 Beav. 486, and note there.

(*m*) *Lord v. Colvin*, 2 D. & S. 82.

(*n*) *Hanson v. Reece*, 3 Jur., N. S. 1204.

(*o*) *Ormerod v. Tate*, 1 East, 464.

(*p*) *Pounset v. Humphreys*, C. P. Cooper, 142; *Griffin v. Eyles*, 1 H. Bl. 122.

(*q*) *Hart, Exp.*, 1 B. & Ad. 660.

(*r*) *Morrison, Exp.*, L. R., 4 Q. B. 153.

(*s*) *Clark v. Smith*, 6 Man. & G. 1051; *Brunsdon v. Allard*, 2 E. & E. 19; 5 Jur., N. S. 596.

(*t*) *Francis v. Webb*, 7 C. B. 736.

(*u*) *Wright v. Burroughes*, 3 C. B. 344.

(*x*) *Chapman v. Haw*, 1 Taunt. 340; *Morse v. Cooke*, 13 Price, 473; *McCl.* 211.

the client collusively, without regard to a notice (*y*) from the attorney not to do so, or should otherwise by collusion attempt to deprive the solicitor of his costs, the latter has no right to proceed to execution in the suit contrary to the plaintiff's order, for the purpose of securing a fund out of which the costs may be paid (*z*), much less could he attain his object by means of execution against the person of the defendant; who, if he were already in the custody of the sheriff, could not be detained (*a*) in satisfaction of the lien after payment or release, whether collusive or otherwise, of the debt for which he was taken in execution, though the attorney had given notice to the client not to discharge the defendant without his consent.

The proper remedy of the solicitor, in such a case, is to apply to the equitable jurisdiction of the court in which the action was brought, and which may make an order against both plaintiff and defendant, for repayment of the costs to the extent of the lien (*b*). Or the solicitor may proceed to recover his costs against the person who has paid the money under the collusive arrangement (*c*); or if a security have been given for the amount, it may be ordered to be delivered to the solicitor, that he may take his costs and hold the balance for the person entitled (*d*).

But the solicitor must be able to show that everything has been rightly done; for otherwise, as for instance if he sued without authority, the court will give him no assistance (*e*). And he must earn his equitable remedy by doing whatever, under the

(*y*) But if a person who holds a fund for those entitled states that he cannot attend to a notice unless prevented from paying it over by legal process, the attorney must not rest upon his notice, but must take proceedings to secure the fund. (*Townsend v. Reade*, 4 L. J., N. S., Ch. 233.)

(*z*) *Games, Exp.*, 3 H. & C. 294.

(*a*) *Martin v. Francis*, 2 B. & Ald. 402; *Marr v. Smith*, 4 id. 466; *Pyne v. Erle*, 8 T. R. 407; *Barker v. St. Quentin*, 12 M. & W. 441; *Langley v. Headland*, 19 C. B., N. S. 42; 11 Jur., N. S. 431.

(*b*) See *Welsh v. Hole*, Dougl. 238; *Ormerod v. Tate*, 1 East, 464; *Read v. Dupper*, 6 T. R. 361; *Barker v. St. Quentin*, 12 M. & W. 441; 13 L. J., N. S., Ex. 144; *White v. Pearce*, 7 Hare, 276. The affidavit should show the amount claimed. (*Davies v. Lowndes*, 3 C. B. 823.) The same rule existed in favour of the proctor in the Admiralty Court. (*Araminta, Swab. Ad.* 81.)

(*c*) *Swain v. Senate*, 2 Bos. & P. N. R. 99.

(*d*) *Gould v. Davis*, 1 Cr. & J. 415.

(*e*) *Abbott v. Rice*, 3 Bing. 132.

circumstances, may be equitable on his part. Where therefore the debt was released to the defendant upon condition of his giving up to the plaintiff the pawn tickets of pledged property, the court refused to order the delivery of that property to the attorney after it had been redeemed by the plaintiff, unless the attorney would repay the plaintiff the redemption money (*f*).

While the sum agreed to be paid as a compromise is unpaid, the court, without otherwise disturbing the arrangement, will direct the defendant to pay the plaintiff's solicitor so much of it as will satisfy the lien (*g*).

The lien will not prevent the interference of the court where a defendant is entitled to relief from the verdict against him on the ground of the claim of the plaintiff's solicitor upon the judgment for costs, the lien being at an end where the client either by his own act or by the act of the law and without collusion, is deprived of the means of further enforcing his claim against the opposite party (*h*).

In equity the client's right to set off (*i*) whatever may be due from him to the opposite party against the fund recovered, is not affected by the lien, it being considered that the lien only binds that which is ultimately found due to the client (*h*); but this rule did not apply to the set-off of the costs of different suits in equity, and still less to the set-off of costs in equity against costs at law (*l*).

In consequence of a diversity in the practice of the different courts of law upon this point, it was ordered by one of the General Rules (*m*) that no set-off of damages or costs between parties should be allowed to the prejudice of the attorney's

(*f*) *Langley v. Headland*, 19 C. B., N. S. 42.

(*g*) *Lowndes v. Davies*, 3 C. B. 808; *Slater v. Mayor of Sunderland*, 33 L. J., N. S., Exch. 37.

(*h*) *Symons v. Blake*, 2 Cr. M. & R. 416.

(*i*) As to the right of set-off, see Judicature Act, 1873, s. 24, and Orders XIX. rule 3, and XXII. rule 10.

(*k*) Per Lord Eldon, *Taylor v. Popham*, 15 Ves. 72; *Bawtree v. Watson*,

2 Keen, 713; 7 L. J., N. S., Ch. 183; see *Rhodes, Exp.*, 15 Ves. 539; *Verity v. Wyld*, 4 Dr. 427. But see *Bailey v. Birchall*, 2 H. & M. 371.

(*l*) *Smith v. Brocklesby*, 1 Anst. 61; *Wright v. Mudie*, 1 Sim. & S. 266; *Collett v. Preston*, 15 Beav. 458.

(*m*) No. 63, Hil. T. 1853, following No. 93, Hil. T. 1832. For the practice under this rule, see *Archbold's Practice* by Prentice, ed. 12, 140—142.

lien for costs in the particular suit against which the set-off is sought. But interlocutory costs in the same suit awarded to the adverse party may be deducted.

234. Where judgments obtained in different actions, or on a single award under a reference of different actions, are sought to be set off against one another, the lien, which does not extend beyond the costs in the particular cause, is protected by the general rule to the full extent of the right as it existed before the rule, from being prejudiced by the set-off (*n*). And to such cases only the rule applies, not to cases of set-off between parties to the same suit. Therefore, where in an action against two, they severed, and appeared by different counsel and attorneys, and the plaintiff succeeded against one, but failed against the other, the costs of the latter defendant were ordered to be set off against the damages and costs recovered by the plaintiff against the former, though the effect was to defeat the lien of the plaintiff's attorney (*o*).

The lien of the attorney upon a judgment being considered in the courts of law, where non-possessory liens were not recognized, as nothing more than a right to the protection of the court when in danger of losing his costs by the act of his client, it was held that the plaintiff in an action could not avoid a set-off claimed by the defendant, on the ground that the plaintiff's attorney had a lien for his costs on the debt which the plaintiff was seeking to recover, and that the plaintiff was suing as trustee on his behalf (*p*). But in Chancery it was held that the lien of the solicitor was of such a substantial nature, that his client was a trustee for him; and that the costs in respect of which the lien was claimed, could not in consequence be set off against a debt due from the client (*q*).

(*n*) *Stephens v. Weston*, 3 B. & C. 535; *Watson v. Maskell*, 1 Bing. N. C. 366; 1 Sc. 658; *Domett v. Helyer*, 2 Dow, P. C. 540.

(*o*) *Lees v. Reffitt*, 3 Ad. & El. 707, following *George v. Elston*, 1 Sc. 518;

1 Bing. N. C. 513; *Rawlings v. Sewell*, 7 Sc. 230.

(*p*) *Mercer v. Graves*, L. R., 7 Q. B. 499.

(*q*) *Cleland, Exp.*, L. R., 2 Ch. 808.

Of Maritime Liens.

235. The maritime law, like the civil law upon which it is founded, admits the validity of a lien without possession; and if reasonable diligence be used and the proceeding be *bonâ fide*, such a lien may be enforced into whose soever possession the property subject to it may come (*r*). By it in addition to his personal remedy against the owner (*s*), the mariner has a lien for his wages upon the ship, which he may secure by arresting it (*t*), and upon the freight, if any be earned, but not upon the cargo or the money received in respect of its insurance; nor upon any other ship than that in which he performed his services (*u*). Salvors have also a lien upon the ship for the reward of their labours; and the like privilege is given to demands for pilotage and towage, upon the equitable principle that the owner of the ship shall not profit by the exertions of those by whom his property has been saved or made profitable without making a due recompense (*x*).

236. But, independently of the statute law, neither the master of the ship for his wages, nor he, nor any other creditor (unless a possessory lien can be established), in respect of advances for the fitting, repairs or other uses or necessities of the ship, or for premiums paid by the master for procuring cargo, are entitled by the law of England to any lien upon the ship (*y*); although such liens were and are recognized by the civil law (*z*), and by the laws of those countries which have adopted it.

(*r*) *Harmer v. Bell*, Bold Buccleugh, 7 Moo. P. C. 267; *Tatham*, app. André, resp., 1 Moo. P. C., N. S. 386; 9 Jur., N. S. 1019; *Europa*, B. & L. 89.

(*s*) *Duncan v. Benson*, 1 Exch. 537; 3 id. 644.

(*t*) *The Nicolai Heinrich*, 17 Jur. 329.

(*u*) *Julindur*, 1 Sp. 71.

(*x*) *Dowthorpe*, 2 W. Rob. 73; *Louisa Bertha*, 14 Jur. 1007; *Linda Flor*, 4 Jur., N. S. 171; *Lady Durham*,

3 Hag. Ad. 196.

(*y*) *Wilkins v. Carmichael*, Dougl. 97; *Buxton v. Snee*, 1 Ves. 154; *Watkinson v. Barnardiston*, 2 P. W. 367; *Smith v. Plummer*, 1 B. & Ald. 575; *Hussey v. Christie*, 13 Ves. 594; 9 East, 426; *Neptune*, 3 Knapp, 94; *Pacific*, 10 Jur., N. S. 1110; B. & L. 248; *Scio*, L. R., 1 Ad. 353.

(*z*) *Abbott on Shipping*, 142, 149; *Colquhoun*, Sum. Rom. C. L., § 1480; *Stainbank v. Fenning*, 15 Jur. 1082; per *Jervis*, C. J.

Yet even by our law, if the master, as the owner's agent, had made a special contract for the use of the ship, in a manner which necessitated an outlay upon it, the matter might be treated as one between principal and agent (204); and the owner and his mortgagees, either admitting the agency or not repudiating the contract, would not be allowed to take the benefit without bearing the burthen. The master, therefore, in such a case has been held entitled to a lien on the ship and on the money produced by the contract for his outlay and indemnity against all liability incurred in the transaction (*a*).

237. And by the act 7 & 8 Vict. c. 112, s. 16, and the yet larger provisions in favour of the master contained in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 191, every master of a ship has, so far as the case permits, the same rights, liens and remedies for the recovery of his wages, which by the latter statute, or by any law or custom, any seaman not being a master has for the recovery of his wages. This provision relates only to claims for the master's wages against the owner and his property, and does not alter the relation between master and seaman (*b*); and as both masters and seamen were still left without any remedy in the Admiralty Court for wages, when the wages were due under a special contract, the Admiralty Court Act, 1861 (*c*), gave to the High Court of Admiralty jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements (*d*) made by him on account of the ship; with a proviso that the plaintiff shall not be entitled to costs where he shall not recover £50, unless the judge shall certify that the cause was a fit one to be tried in the court.

The Court of Admiralty, therefore, having before the act of

(*a*) *Bristow v. Whitmore*, 9 H. L. C. 391; S. C., 1 Johns. 96; 6 Jur., N. S. 29; 8 id. 291; 4 De G. & J. 325.

(*b*) *Salacia*, 9 Jur., N. S. 27.

(*c*) 24 Vict. c. 10, s. 10.

(*d*) *Mary Ann*, L. R., 1 Ad. 8. The word "disbursements" does not include mere liabilities for wages or necessities. (*Chieftain*, B. & L. 104; 32 L. J., N. S., P. M. & A. 106; *Edwin*, 33 id. 197; B. & L. 281.)

1861 (*f*) jurisdiction to deal with these matters in certain cases, viz., with master's wages where not fixed by special contract, and with all unsettled accounts, including therefore disbursements by the master, where a set-off or counterclaim was set up to his claim for wages (*g*), and recognizing in those cases the existence of a maritime lien, the present Admiralty jurisdiction of the High Court is considered to be empowered by the act of 1861 to enforce a maritime lien in like cases arising under the extended jurisdiction created by the act of 1861; but a maritime lien is held not to arise merely by force of the statutory power to enforce claims by proceedings in rem (*h*). The master's lien for services and disbursements is not affected by the circumstance that the possession of the vessel at the time when they were given and made was fraudulent, if he were not privy to the fraud (*i*); or by his being part owner of the ship (*k*).

238. The act of 1861 has also given jurisdiction to the Admiralty Court, now vested in the Admiralty division of the High Court, over claims for the building, equipping or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the court (*l*); and over claims for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner (*m*) of the ship is [was?] domiciled in England or Wales, but with a proviso that if the plaintiff do not recover £20 he shall have no right to costs, charges or expenses incurred in the cause, unless the judge shall certify that the cause was a fit one to be tried in the court (*n*).

(*f*) By the act of 1854, s. 191.

(*g*) The mortgagee, like the owner, was bound to go into the account if he claimed deductions from the wages. (*Caledonia*, 2 Jur., N. S. 48.)

(*h*) *Mary Ann*, L. R., 1 Adm. 8; 55 L. J., Adm. 6.

(*i*) *Edwin*, 38 L. J., P. M. & A. 197; B. & L. 281.

(*k*) *Feronia*, L. R., 2 Ad. 65.

(*l*) Sect. 4.

(*m*) *I. e.*, owner or part owner when the supplies were furnished. (*Ella A. Clark*, 9 Jur., N. S. 312; B. & L. 32.)

(*n*) Sect. 5. This only applies to British and colonial ships, and does not supersede s. 6 of 3 & 4 Vict. c. 65, which gives jurisdiction in cases of supplies to foreign ships, both in English and colonial ports. (*Ella A. Clark*, *supra*; *Wataga*, Swab. 165.)

239. The jurisdiction is also given over any claim by the owner, consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage to the goods or any part thereof by the negligence, misconduct or breach of duty or contract on the part of the owner, master or crew of the ship; unless it be shown that at the institution of the cause any owner or part owner of the ship is domiciled in England or Wales; with a like proviso as to costs as in the case of the claim for necessities (*o*).

The court also has jurisdiction over any claim for damage done by any ship (*p*).

Tried by the rule applied to the master's wages and disbursements in the case of *The Mary Ann* cited above, it appears that there is a lien under the act of 1861 for seamen's wages, though not fixed by special contract, and for damage to the ship; but for building, equipping or repairing a ship, or for necessities supplied to her, or for damage to the goods, no maritime lien but only a statutory remedy against the res (*q*).

The act of 1861 confers no jurisdiction over claims for repairs and necessities done and supplied to a foreign ship in a foreign port (*r*).

240. The consignee of the ship and cargo has a lien on the proceeds of the cargo for what he has laid out to enable the ship to proceed on her voyage. And even one who is not a consignee, but has made such an advance *bonâ fide*, and with the sanction of the owner of the cargo, who thereby obtains the benefit of the advance, is entitled to a lien on the proceeds of the cargo if he can arrest them before they come to the hands of the shipper, subject to proper deductions in favour of the consignee, and the lien will extend to all loss and damage arising from a breach of contract by the consignor to consign the cargo to him; but not to any commission or

(*o*) Sect. 6.

(*p*) Sect. 7.

(*q*) See Gustaf, 31 L. J., N. S., Ad.
207, 660; Pacific, Bro. & L. 243;

Troubadour, L. R., 1 Ad. 302; Johnson v. Black, Two Ellens, L. R., 4 P. C. 161.

(*r*) India, 9 Jur., N. S. 417.

profit which might have been earned in respect of the consignment if it had been so made (*s*).

The owners of cargo sold for the necessities of the ship have no lien upon the ship for the amount of their loss, which is the subject of general average (*t*); nor does the right to general average contribution after adjustment give the owner of the cargo any lien under the maritime law, unless, by reason of the possession of the cargo, it can be maintained as a possessory lien (*u*).

241. There is a statutory lien upon any ship or boat stranded or otherwise in distress on the shore of any sea or tidal water within the limits of the United Kingdom, for a reasonable amount of salvage and expenses properly incurred in assisting, or saving the lives of the persons belonging to or the cargo or apparel of such ship or boat, or any portion thereof, or in the salvage of any wreck saved by any other person than a receiver of wreck within the United Kingdom (*v*) (1061).

242. There is also a lien upon a ship and freight for the amount of the damage, which wrongfully, that is, by the fault of those in charge of it, does injury to another ship (*x*). Independently of the statute law the ship owner was also personally liable to the whole amount of such damage. But following the example set by several foreign nations in narrowing this liability, it has been enacted (*y*) that the owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say,

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship;

(*s*) *Young v. Neill*, 32 Beav. 529; 9 Jur., N. S. 376.

(*t*) *La Constancia*, 2 W. Rob. 487.

(*u*) *North Star*, 1 Lush. 45; *Cleary v. M'Andrew*, 2 Moo. P. C., N. S. 216.

(*v*) Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 458, 459; and see 25 & 26 Vict. c. 63, Parts VIII., IX.

(*x*) *Aline*, 1 W. Rob. 111; *Harmer v. Bell*, Bold Buccleugh, 7 Moo. P. C. 267; *Europa*, 9 Jur., N. S. 699; 2 Moo. P. C., N. S. 1; B. & L. 89.

(*y*) Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54; substituting the present provisions for those of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 504.

- (2.) Where any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship;
- (3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;
- (4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise or other thing whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things to an aggregate amount exceeding £15 for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room.

Interest is payable from the date of the collision when the ship is in ballast, and from the natural termination of the voyage when freight is payable (z).

243. This statute being expressly made applicable to any ship, whether British or foreign, follows a British ship into all seas, and applies to all foreign ships in British waters; but will not avail British ships in foreign countries, nor, it is said, foreign ships before British courts, in case of damage on the high seas beyond the jurisdiction of the British legislature (a).

Under the act of 1854, where the damage was caused by a British to a foreign ship within three miles of the British coast,

(z) *Straker v. Hartland*, 2 H. & M. 570; 10 Jur., N. S. 1143.

(a) *Cail v. Papayanni*, 1 Mo. P. C.,

N. S. 471; S. C., *Amalia*, 9 Jur., N. S. 1111; *MacLach. Shipping*, Suppl. 36.

the former was (*b*) entitled to the benefit of the act. But a foreigner could not be relieved in respect of damage done on the high seas to a British ship (*c*), nor it seems could a British ship which had damaged a foreigner; nor could one foreigner claim the benefit of the act against another (*d*).

244. In accordance with the construction (*e*) put upon one of the former statutes for limiting the ship owner's liability, the value of the ship will under ordinary circumstances be ascertained by valuation and appraisement, and not by making a deduction from the prime costs proportioned to the age of the ship; and the value is taken to be the price for which the ship might have been sold, immediately before the occurrence of the damage (*f*): not reducible by the disbursements and fees incidental to the sale (*g*), nor by the value of the injury which has been received in the collision by the offending ship herself (*h*), the owner of which is still liable, though she founders in consequence of the accident (*i*). His liability, however, is not increased by reason that bail has been given for the ship beyond her ascertained value (*k*).

245. In the valuation of the ship must be included the value of her appurtenances, such as chronometers (*l*) (**32**), and whatever is on board for the object of the voyage and adventure on which she is engaged, whether it be warfare, conveyance of passengers or goods, or fishery; the nature of which last pursuit (recompensed as it is by cargo and not by freight), brings within the rule the stores and implements provided for capturing the fish, and for bringing home the produce (*m*).

(*b*) General Iron Screw Collier Co. 725.
v. Schurmann, 1 Jo. & H. 180.

(*c*) Wild Ranger, 9 Jur., N. S. 134.

(*d*) Cope v. Doherty, 4 K. & J. 367;
2 De G. & J. 614.

(*e*) Dobree v. Schroder, 2 M. & C.
489; 53 Geo. 3, c. 159.

(*f*) Wilson v. Dickson, 2 B. & Ald.
2; Cannan v. Meaburn, 1 Bing. 465;
African Steam Ship Co. v. Swanzy, 2
K. & J. 660.

(*g*) Leicester v. Logan, 4 K. & J.

(*h*) Mary Caroline, 3 W. Rob. 101.

(*i*) Brown v. Wilkinson, 15 M. & W.
391.

(*k*) Richmond, 3 Hag. A. R. 481;
Mary Caroline, *supra*.

(*l*) MacLach. Shipp. 287, *sc.*, because
they pass by assignment of ship, her
tackle and appurtenances. (Langton
v. Horton, 6 Jur. 910.)

(*m*) Dundee, 1 Hag. A. R. 109;
S. C., Gale v. Laurie, 5 B. & C. 156.

246. Under the act of 1854, which measured the liability of the owner by the value of the ship and freight, the freight included (*n*) the value of the carriage of any goods or merchandise belonging to the owners of the ship; passage money; and the hire due or to grow due under any contract; except only such hire, in the case of a ship hired for time, as might not begin to be earned till the expiration of six months after the loss or damage.

Under a former statute (*o*), the words of which were "the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage," it was held (*p*), that freight for that voyage, whether paid in advance or not, was included: but only (*q*) that which under the circumstances was or might have been earned by the particular voyage, and not all which might have been earned if the ship had met with no disaster.

247. The construction of the 504th section of the act of 1854, as regarded the extent of the liability, was that in cases of loss of life or personal injury it extended to the sum of £15 per registered ton (*r*); and the valuation was made on the same principle, where damage had happened both to persons and goods, for the purpose of assessing the compensation for the former: but where these demands were settled, the ship was only estimated at her actual value for the purpose of calculating compensation in respect of the damage to the goods, notwithstanding the occurrence of the personal injury. In cases where both claims arose the owners of the goods, upon the principle of marshalling, were entitled to have all demands in respect of the personal injury satisfied as far as possible out of the excess, if any, of the fund available for them, beyond the

(*n*) Merchant Shipping Act, 1854, s. 505.

(*o*) 53 Geo. 3, c. 159, repealed by the Merchant Shipping Repeal Act, 1854.

(*p*) *Wilson v. Dickson*, 2 B. & Ald. 2.

(*q*) *Cannan v. Meaburn*, 1 Bing. 465.

(*r*) *Glaholm v. Barker*, 11 Jur., N. S. 434.

actual value which alone would be available for the owners of the goods (*s*).

248. The liability arises in respect of every loss of life, personal injury, or loss of or damage to goods arising on distinct occasions, to the same extent as if no other loss, injury or damage had arisen (*t*).

249. The lien could only be enforced in the Court of Admiralty (*u*); but the act provided (*x*) that the benefit of the statute might be obtained by the ship owner against whom claims are made or apprehended in respect of liability for loss of life, personal injury or damage, by proceedings in the Court of Chancery (*y*) in England or Ireland, the Court of Session in Scotland, or any competent court in a British possession, to determine the amount of the liability and make a rateable distribution among the claimants; and for this purpose the courts were empowered to stop all actions and suits pending in any other courts in relation to the same subject matter, and to regulate the proceedings as to the parties, the exclusion of claimants who do not come within a certain time, the requiring security from the owner, and the payment of costs.

250. The provisions of the act apply, though the adverse claimant have obtained a definitive judgment of the Court of Admiralty condemning the ship. The Court of Chancery, however, could not prevent a person who had obtained such a judgment from selling the ship and retaining out of the proceeds such costs as he might be entitled to under the order of the Court of Admiralty; but would prevent him from obtaining more than his rateable share of the proceeds of the sale, and for that purpose would order (*z*) payment of the balance of the proceeds into court.

(*s*) *Nixon v. Roberts*, 1 Jo. & H. 739.

(*t*) *Merchant Shipping Act*, 1854, ss. 506.

(*u*) *Harmer v. Bell*, *Bold Buccleugh*, 7 Moo. P. C. 267.

(*x*) *Merchant Shipping Act*, 1854, s. 514.

(*y*) See the *Judicature Act*, 1873, ss. 3, 16.

(*z*) *Leycester v. Logan*, 3 K. & J. 446.

251. Maritime liens are not discharged by the sale of the ship, but may be enforced against it in the hands of purchasers without notice, provided the proceedings be *bonâ fide* and taken with reasonable diligence (*a*).

CHAPTER II. PART 2.—OF POSSESSORY LIENS, AND HEREIN OF SPECIFIC AND GENERAL LIENS.

252. *Of the Nature of Specific and General Liens.*

268. *Of the Lien of the Vendor of Chattels.*

271. *Of Liens for Supplies or Services under legal Obligations.*

289. *Of Liens for Labour upon Chattels.*

315. *Of Liens for Debts incurred in the course of Trade.*

252. Possessory liens require the possession by the creditor of the chattels which they are alleged to bind (*9*).

Such liens are either *specific* or *general*; the former, which are favoured in law (*b*), enabling the holder of the chattel to retain it only until payment of the particular debt which is due in respect of the chattel; the latter, which are regarded with jealousy by the courts (*b*), extending to any balance which may be due from the owner of the chattel to the person who holds it, and arising only by usage or agreement in favour of persons who carry on some particular kinds of business.

Before noticing in detail the different cases in which general and specific liens arise, it is necessary to point out certain rules by which they are generally affected, and to explain the nature and incidents of the possession which is essential to their validity, and by the loss or abandonment of which they are destroyed (**1361**).

* **253.** The property upon which the lien is claimed must

(*a*) *Harmer v. Bell*, *Bold Buccleugh*, 7 Moo. P. C. 267; *Europa*, 9 Jur., N. S. 699; 2 Moo. P. C., N. S. 1; *B. & L.* 89; *Nymph*, Swab. 86.

(*b*) *Jacobs v. Latour*, per Best, C. J., 5 Bing. 130; *Scarfe v. Morgan*, 4 M. & W. 270; *Rushforth v. Hadfield*, 6 East, 519; *Gladstone v. Birley*, 2 Mer. 401.

belong to the person against whom it is claimed in the same character in which the debt is owing. A banking firm therefore cannot retain a balance due to them from one of the partners, to answer a debt due to them from another firm of which that partner is a member (*c*). And if a member of a firm give a security upon property to his bankers, for money lent to him upon his separate credit, the bankers have no lien on the security for the general balance due from the firm when the firm becomes entitled to the property (*d*).

254. Possession of the property is as essential to the validity of a general as of a special lien. So that a vendor may stop goods in transitu, if they have not come to the possession of the consignee, though in consideration of the consignment the latter have accepted bills drawn by the consignor, and have paid freight or other charges on the goods (*e*). The agreement under which he has done so is merely executory and the subject of an action. The result will be the same if the consignor, in breach of his agreement, consign the goods to another person, who transmits them to him who was originally named as consignee, as the agent of the actual consignee (*f*). But it seems that if the goods come to the consignee's hands, the lien will hold in respect of payments and acceptances made before notice of the consignor's death or insolvency, though the goods be not received till after that event (*g*).

255. To sustain a possessory lien the property must have come to the hands of the claimant in the ordinary course of dealing, and not for any special purpose, or subject to any special legal consequence which may be inconsistent with the claim. No lien will arise where the possession was obtained without authority, or by fraud, misrepresentation or other

(*c*) *Watts v. Christie*, 11 Beav. 546; see *Ryall v. Rolle*, 1 Atk. 165, 184; 1 Ves. 348, 373.

(*d*) *McKenna, Exp.*, 7 Jur., N. S. 588; 3 De G. F. & J. 629.

(*e*) *Kinloch v. Craig*, 3 T. R. 123, 788; 4 Bro. P. C. 47.

(*f*) *Bruce v. Wait*, 3 M. & W. 15.

(*g*) *Hammonds v. Barclay*, 2 East, 226; but the consignor's executors confirmed the consignment.

wrongful act (*h*); not even to secure payments made in respect of the goods by the person who has so obtained them (*i*); nor where there has been a wrongful detainer, in respect of a claim which arose after the detainer became wrongful (*h*); nor where the goods were deposited for safe custody only and without a special contract for a lien (*l*); or for a special purpose or subject to a direction to pay the proceeds of the sale to a particular account (*m*). In the case of a banker no lien will attach upon exchequer bills delivered to him for the special purpose of receiving the interest on them and exchanging them for new bills (*n*), though it be usual for bankers to perform that duty for their customers; nor upon securities casually left with a banker (*o*); and the mere holding of goods by an agent will confer no lien if by the terms of the contract, by his own permission, or by legal construction, his possession is that of his principal (*p*). So if goods be purchased by a factor, and be left by agreement in the hands of the vendor, in whose hands the principal exercises acts of dominion over them, the possession is clearly in him, and the factor cannot acquire a lien by taking possession after the bankruptcy of the principal (*q*). Again, possession delivered by a carrier, under the order of the shipper given after his bankruptcy, to a factor who has no right by special agreement or by possession of the bill of lading or otherwise to require delivery, will give the factor no lien though the goods were shipped on his account, and even though he have accepted bills on the faith of the consignment (*r*). And as to the effect of a contract, if factors sign a special receipt for goods delivered to them for sale, by which they undertake to pay the proceeds to the principal or his order, the goods if not

(*h*) *Madden v. Kempster*, 1 Camp. 12; *Griffiths v. Hyde*, Selw. N. P. 1390, ed. 11; *Taylor v. Robinson*, 2 Moo. 730; *Oursell, Exp.*, Ambl. 297.

(*i*) *Lempriere v. Pasley*, 2 T. R. 485; *Ayling v. Williams*, 5 Car. & P. 399.

(*h*) *White, Exp.*, 2 M. D. & De G. 486.

(*l*) *Muir v. Fleming*, D. & R., N. P. C. 29; see *Hartop v. Hoare*, 3 Atk. 44—47; *Walker v. Birch*, 6 T. R. 258;

Cullen, Re, 27 Beav. 51.

(*m*) *Holroyd v. Griffiths*, 3 Dr. 428.

(*n*) *Brandao v. Barnett*, 12 Cl. & F. 787; *Leese v. Martin*, L. R., 17 Eq. 224.

(*o*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*p*) *Hoggard v. Mackenzie*, 25 Beav. 493; 4 Jur., N. S. 1008.

(*q*) *Taylor v. Robinson*, 2 Moore, 730.

(*r*) *Nichols v. Client*, 3 Price, 547.

sold must be returned to the principal (*s*). But a lien may arise if the chattel be allowed to remain in the hands of the deposittee after failure of the special purpose for which it was delivered (*t*).

256. Neither the possession which is necessary to support (*u*), nor that which is sufficient to defeat (*x*) a lien, need be of a corporal kind (1396). The principal may have a lien by virtue of the possession of his agent (*y*); and the lien will arise if the goods have been received, and an act of ownership exercised, as by paying for warehouse room or taking samples, measuring and marking the goods or expending money in labour on them. But the possession is not considered to be vested in a factor by the mere payment by him of freight (*z*). The right of possession conferred by a possessory lien will support an action founded upon an alleged ownership in the person claiming the lien (*a*).

257. The possession must be continuous (1361); there can, therefore, be no lien where by the nature of the contract between the owner of the property and the holder, it is received subject to the owner's right of disposition. Hence the agister of cattle, not having entire possession of them, cannot retain them (*b*) in respect of the agistment; nor the stable keeper horses left in his charge, for their keep, or for labour or money bestowed upon them, though at the owner's request (*c*), for he takes them upon the terms that the owner is to have the control and right

(*s*) *Walker v. Birch*, 6 T. R. 258.

(*t*) *Pemberton, Exp.*, 18 Ves. 282.

(*u*) *Bull v. Faulkner*, 2 De G. & S. 772.

(*x*) *Wright v. Lawes*, 4 Esp. 82; *Cooper v. Bill*, 3 H. & C. 722; 34 L. J., Ex. 161.

(*y*) See *Belcher v. Oldfield*, 6 Bing. N. C. 102; 8 Scott, 221.

(*z*) *Kinloch v. Craig*, 3 T. R. 123, 783. It was held that a shipwright, whose graving flat was attached and floated close to the ship, to enable his workmen to repair her, and who had

tools and materials on board, had not sufficient possession to support a lien. (*Scio, L. R.*, 1 Adm. 353.)

(*a*) *Legg v. Evans*, 6 M. & W. 36; *Rogers v. Kennay*, 9 Q. B. 592.

(*b*) *Chapman v. Allen*, Cro. Car. 271; *Jackson v. Cummins*, 5 M. & W. 342; *Hobby v. Ruell*, 1 Car. & K. 716.

(*c*) *Chapman v. Allen*, Cro. Car. 271; *Wallace v. Woodgate*, 1 Car. & P. 575; *Bevan v. Waters*, 3 id. 520; *Judson v. Etheridge*, 1 C. & M. 743; *Orchard v. Rackstraw*, 9 C. B. 698.

of possession and use at his pleasure, which is inconsistent with the nature of a lien. This reason, however, will not affect the lien of an innkeeper, to whose stable a horse is brought by a guest, and occasionally removed by him for his use or pleasure with the intention of returning it; because the original contract under which it was left is presumed to continue unless there is evidence that it has been changed (*d*) (272).

258. It was formerly considered that there could be no lien where a special contract was made for a reasonable or absolutely fixed price for the work or other consideration in respect of which the lien was claimed (*e*). But it has long been established, that a lien may arise under such a special agreement, as well as where the contract to pay a reasonable price is only implied, provided the special agreement contain no stipulation which is inconsistent with the nature of a lien (*f*). Such a stipulation is found in the contract made with a livery stable keeper for the care of a horse, which is to be delivered to the owner for his use whenever he may require it. So it is where chattels are sold for payment at a future time. "If I buy of you a horse for 20*s.*," says Haydon, J., "you retain the horse till you be paid the 20*s.*; but if I am to pay you at Michaelmas next ensuing, you may not detain the horse until you be paid" (*g*). Because on the sale of a chattel, where no day of payment is fixed, payment of the price and delivery are concurrent acts; but where a future day is fixed for payment, the vendor not keeping possession can have no lien.

An implied contract to pay a reasonable sum for a service, which it has been attempted by fraud to obtain without payment, will be raised by law, and will carry a lien (*h*).

(*d*) *Allen v. Smith*, 12 C. B., N. S. 638; 6 L. T., N. S. 459; 9 Jur., N. S. 230, 1284.

(*e*) See *Brenen v. Carrint*, Bac. Abr. Trover, E.

(*f*) *Chase v. Westmore*, 5 Mau. & S. 180; *Crawshay v. Homfray*, 4 B. & Ald. 50; *Scarfe v. Morgan*, 4 M. & W.

270; per Gibbs, C. J., in *Hutton v. Bragg*, 7 Taunt. 13; see *Jones v. Peppercorne*, Joh. 420; 28 L. J., Ch. 158.

(*g*) *Hostiler*, acc. sur le cas, cited Year Book, 5 Edw. 4, E. T., No. 20.

(*h*) *Rumsey v. North Eastern Rail. Co.*, 14 C. B., N. S. 641.

259. Where the holder of property holds it as agent for another, who claims a lien, he must be able to show an authority for doing so; if he cannot, the other will lose his lien for want of possession; and the actual holder having no lien will be responsible, if after demand he part with the goods to the creditor. He cannot detain them by virtue of a mere authority from the latter to receive payment of the debt (*h*).

260. A lien may arise against the owner of a chattel by the act of an agent done within the scope of his authority, as where a tailor receives from a servant cloth for liveries; although the agent could not acquire a lien by paying the debt (*i*).

261. A lien does not attach upon documents or other chattels in the hands of a person as officer of a court of justice; such as the records of court in the hands of a clerk of assize (*k*); proceedings in bankruptcy in the hands of a clerk of enrolments (*l*); of the solicitor in the bankruptcy (*m*); or in the hands of the bankrupt's solicitor (*n*); or on the books of account of a bankrupt (*o*); or upon a dividend on his estate in the hands of the trustee (*p*); or upon his estate in the hands of a receiver or manager in the bankruptcy (*q*); or upon his certificate (*r*); or upon his papers delivered after an act of bankruptcy to his solicitor (*s*).

So the solicitor of the official liquidator of a joint stock company has no lien for his costs upon the proceedings in the winding-up (*t*); nor the commissioners upon a commission of partition (*u*); though barristers have been held to be justified

(*h*) *Grove, Exp.*, 3 Bing. N. C. 304.

(*i*) *Hussey v. Christie*, 9 East, 426, per Lord Ellenborough.

(*k*) *The King v. Bury*, 1 Leach, Cr. Ca. 201; 1 Dougl. 194, n.

(*l*) *Sandison, Exp.*, 19 Ves. 161; 1 Rose, 275.

(*m*) *Anon.*, 1 Rose, 207.

(*n*) *Hardy, Exp.*, 1 Rose, 895. Where the bankruptcy has been superseded, *quere*, see *Shaw, Exp.*, Jac. 270.

(*o*) *General Rules in Bankruptcy*, 1870, rule 110.

(*p*) *White, Exp.*, 1 Atk. 90.

(*q*) *General Rules in Bankruptcy*, 1871, rule 3.

(*r*) *Anon.*, 1 R. & M. 330.

(*s*) *Lee, Exp.*, 2 Ves. jun. 285.

(*t*) *Union Cement, &c. Co., L. R.*, 4 Ch. 627.

(*u*) *Young v. Sutton*, 2 V. & B. 365.

in refusing to produce evidence taken under a commission, until payment of their fees (*x*). There can also be no lien upon an original will (*y*); or upon the certificate of registry of a British merchant ship (*z*).

262. A possessory lien does not extend to charges for holding the chattel during its detention by virtue of the lien (*a*).

263. The possessory lien upon money, as distinguished from the lien upon other personal chattels, is divisible, and extends only to so much of it as equals the amount of the debt (*b*).

Of General Liens.

264. In certain trades, in which it is usual for advances to be made by the agent to the principal, the right to a general lien has been long established and is admitted without further proof (*c*). But in no others is it allowed without strict evidence of general usage or course of dealing, or of special agreement; to which a general resolution by persons claiming the lien, that they will only receive the goods of those who deal with them subject to the lien, is equivalent as against persons who have notice of the resolution; at least in those cases in which it is optional with the person insisting upon the lien to receive the goods, and not compulsory as in the case of an innkeeper (*d*): but the lien will not be extended beyond the strict terms of the notice (*e*).

Nor in those cases in which this form of lien is judicially recognized is it sufficient that the claimant follows the trade of which the lien is admitted to be a privilege. It is also necessary

(*x*) *Smith v. Hallen*, 2 Fost. & F. 678; *Peters v. Beer*, 14 Beav. 101; 15 Jur. 1024.

(*y*) *Georges v. Georges*, 18 Ves. 294; *Lord v. Wormleighton*, Jac. 580 (as to solicitor), per Lord Eldon; *Balch v. Symes, T. & R.* 87; see *Law, Exp.*, 2 A. & E. 45.

(*z*) *Merchant Shipping Act*, 1854, 17 & 18 Vict. c. 104, s. 50.

(*a*) *British Empire Shipping Co. v.*

Somes, E. B. & E. 353; 8 H. L. C. 338; 80 L. J., N. S., Q. B. 229.

(*b*) *Miller v. Atlee*, 3 Ex. 799, per Pollock, C. B.

(*c*) *Bock v. Gorrissen*, 7 Jur., N. S. 81; 2 De G. F. & J. 434.

(*d*) *Kirkman v. Shawcross*, 6 T. R. 14.

(*e*) *Cumpston v. Haigh*, 2 Bing. N. C. 449; 2 Sc. 684.

that in the very transaction out of which the claim arises he shall have acted in the favoured character. So that if a person, who acts both as a factor and an insurance broker, effects a policy for a firm with which he has had transactions in both characters, and the evidence shows that he effected it as an insurance broker, he cannot claim for a general balance due to him as a factor (*f*). And the general lien of a factor does not extend to a debt for the purchase-money of goods sold by him to the employer before the employment as factor (*g*); because the demand did not arise out of a course of dealing in that relation.

If a general usage be shown that a lien for a general balance shall be enjoyed by a particular trade, all who deal with persons following that trade are supposed to contract on the footing of the general practice, and to adopt the general lien into the particular contract (*h*).

The goods upon which the lien is claimed must also be within the terms of the agreement, construed according to the general law concerning liens. Where it was agreed that all goods "on hand" should be subject to a lien for a general balance, it was held that goods deposited with the claimant to be used by *the owner* in the process of manufacture were not subject to the lien; which was confined to those upon which the labour of the claimant was employed (*i*). .

The general lien will cover a debt, the direct remedy for which has been barred by the Statute of Limitations (*j*).

265. The rights of strangers cannot be affected by a general lien (*k*). A warehouse keeper therefore cannot claim a lien on goods housed in his warehouse for and in the name of (but not necessarily belonging to) the persons by whom the warehouse keeper is employed, for balances due from them; for

(*f*) *Dixon v. Stansfield*, 10 C. B. 398.

(*g*) *Houghton v. Matthews*, 3 B. & P. 485.

(*h*) *Rushforth v. Hadfield*, 6 East, 519, per Lord Ellenborough.

(*i*) *Cumpston v. Haigh*, 2 Bing. N. C. 449; 2 Sc. 684.

(*j*) *Speers v. Hartley*, 3 Esp. 81; *Morse v. Williams*, id. 418.

(*k*) *Oppenheim v. Russell*, 3 Bos. & P. 42; *Wright v. Snell*, 5 B. & Ald. 350.

by such a custom the goods of foreign merchants would become liable to the private debts of the factor, previously incurred, in respect of goods of other persons, and to an unlimited extent (*l*). The like has been held in the case of a carrier, as regards a claim for a lien against the true owner of the goods, for the general balance due from the factor to whom the goods were consigned for sale (*m*). And if a lien have once attached, even a verbal notice of the cesser of interest of the owner of the property will prevent its extension against him. The lien of a wharfinger was therefore held to be limited to charges incurred in respect of goods prior to the date of a verbal notice of their sale, though no delivery order had been served (*n*).

266. The deposit of property as security for a specific part of a debt, is inconsistent with a general lien (*o*); and a consignee who has accepted the consignment cannot set up a general lien, in opposition to the positive directions of the consignor for the disposal of the property (*p*).

267. A possessory lien entitles the holder of a personal chattel to detain it—

- (1) For the unpaid price of a chattel sold.
- (2) For the cost of supplies furnished, or services rendered, in discharge of the obligation imposed by law upon persons who follow certain callings.
- (3) For the cost of labour bestowed upon the chattel, and whereby its value has been improved.
- (4) For debts incurred in the course of trade between the holder of the chattel and the owner thereof.

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(1) *Of the Lien of the Vendor of Chattels.*

268. The lien of the vendor of chattels (1357) for the purchase-money arises out of his original ownership and

(*l*) *Leuckhart v. Cooper*, 3 Bing. N. C. 99; 7 Car. & P. 119.

(*m*) *Wright v. Snell*, 5 B. & Ald. 350; *Richardson v. Goss*, 3 B. & P. 119.

(*n*) *Barry v. Longmore*, 12 A. & E. 639.

(*o*) *Vere, Exp.*, 4 D. & C. 295.

(*p*) *Frith v. Forbes*, 32 L. J., N. S., Ch. 10.

dominion over the property (*q*), and is independent of actual possession by the vendor, so long as actual possession has not been obtained by the vendee; differing in this respect from other possessory liens, the claimants of which have no other title than the possession upon which the lien is founded. The benefit of the vendor's lien extends to factors (*r*), or persons who buy for others at their own risk, drawing bills upon them for the value of the goods and the commission (*s*); it carries with it a right (which belongs to no other kind of lien (*t*)) to stop the goods in transitu before they are delivered to the purchaser; of which hereafter (1371); and it overrides any lien which may exist against the purchaser, and also against a sub-purchaser from him, though the former may have been paid by the sub-purchaser (*u*).

269. Where goods purchased are subject to charges payable at a future time, whether delivered or not, so that at the time of sale there is no lien for those charges, the lien will not arise (*x*) against the purchaser in consequence of default in payment of the charges at the proper time. And if the purchaser of a chattel detained for a lien pay the demand, after giving notice to the vendor, he may recover (*y*) the amount from the latter.

270. The lien extends to duties which the purchaser has agreed to pay in respect of the chattels, but which have been paid by the vendor, in discharge of his liability to the Crown (*z*).

(2) *Of the Lien for Supplies or Services under Legal Obligations, and herein of the Lien of the Innkeeper, the Carrier and others.*

271. To the innkeeper and the carrier a specific lien is given by law in respect of their obligation to perform the duties of

(*q*) *Bloxham v. Sanders*, 4 B. & C. 941, per Bayley, J.; *Doddsley v. Varley*, 12 A. & E. 632, per Lord Denman.

(*r*) *Drinkwater v. Goodwin*, 1 H. Cowp. 251.

(*s*) *Feise v. Wray*, 3 East, 98.

(*t*) Per Eyre, C.B., in *D. P., Kin-*

loch v. Craig, 3 T. R. 787.

(*u*) *Dixon v. Yates*, 5 B. & Ad. 313.

(*x*) *Crawshaw v. Homfray*, 4 B. & Ald. 50.

(*y*) *Bevan v. Waters*, 3 Car. & P. 520.

(*z*) *Winks v. Hassall*, 9 B. & C. 372.

their respective callings (*a*); to the latter against the particular goods, which he transmits for a reasonable reward to be paid for the carriage of them; and to the former against the chattels of his guest for his board and expenses at the inn.

272. The lien of the innkeeper (in which term is included every person who provides accommodation for such travellers and sojourners as are able to pay for it a reasonable compensation, whether his inn is or is not frequented by public conveyances or furnished with stables (*b*),) arises only where the owner of the goods upon which the lien is claimed is the innkeeper's guest. He has therefore no lien for the keep of a horse or the standing-room of a carriage (*c*) left with him by a person who at the time of leaving them was not his guest; nor will the lien arise in such a case because the owner afterwards becomes an occasional guest at the inn (*d*).

But for the keep of horses brought by a guest to his inn, even though they be occasionally removed, provided the removals be with an intention to return, the innkeeper has a lien (*e*). And his rights in this respect are so extensive that he may detain a horse or other property brought by a guest who is not the lawful owner of it, even though it be stolen (*f*), provided that at the time of the deposit the innkeeper had no notice of the wrongful nature of the possession.

The lien extends to goods which the innkeeper has received and kept for the guest, whether or not he was bound by law to receive them (*g*).

The innkeeper is not bound, where the guest is possessed of his reason and is not an infant, to inquire into the necessity or

(*a*) *Naylor v. Mangles*, 1 Esp. 109; *Rushforth v. Hadfield*, 6 East, 519; 7 id. 224.

(*b*) *Thompson v. Lacy*, 3 B. & Ald. 288.

(*c*) *Binns v. Pigot*, 9 Car. & P. 208. Though it has been held that by the mere leaving a horse the leaver became a guest. (*York v. Grindstone*, 1 Salk. 388.)

(*d*) *Smith v. Dearlove*, 6 C. B. 132.

(*e*) *Allen v. Smith*, 12 C. B., N. S., 638; 9 Jur., N. S., 230, 1284.

(*f*) *Yorke v. Greenough*, 2 Lord Raym. 866; *Johnson v. Hill*, 3 Stark. 172; *Robinson v. Walter*, 3 Bulst. 269; *Turrill v. Crawley*, 13 Jur. 878; *Snead v. Watkins*, 1 C. B., N. S. 267; 26 L. J., N. S., C. P. 57.

(*g*) *Threfall v. Borwick*, L. R., 7 Q. B. 711; 10 id. 210; notwithstanding *Broadwood v. Granara*, 10 Ex. 417.

propriety of the supplies to him, in respect of which the lien is claimed (*h*). But it seems he cannot claim a lien for money lent to the guest, except by special agreement made at the time of the advance (*i*).

Neither the lien of the innkeeper nor that of the carrier extends to the body of the guest or passenger, or to the clothes upon his person (*k*).

273. The carrier, undertaking and being bound by law to receive and carry for a reasonable reward the goods of all persons indifferently, his lien for the carriage extends, as in the case of the innkeeper, to stolen goods delivered to him in the way of his trade; provided that at the time of the delivery he had no notice of the wrongful title (*l*). The carrier's lien only applies to the price of the carriage; when an attempt was made to extend it to charges for booking and warehouse room, it was said there was no lien for such charges (*m*), though in the particular case they were not actually due. But upon clear proof of usage, or of special notice or agreement, the carrier may have a lien for his general balance (*n*).

If by the custom of a particular trade the carrier is paid by the consignor, he has no lien on the goods as against the consignee for the consignor's general balance; because the property is vested in the consignee upon delivery to the carrier (*o*).

It has also been held that a stage coachman has not the privilege of a carrier unless he takes a distinct price for the carriage of the goods as well as of passengers (*p*).

(*h*) *Procter v. Nicholson*, 7 C. & P. 67.

(*i*) *Id.*

(*k*) *Wolff v. Summers*, 2 Camp. 631; *Sunbolf v. Alford*, 3 M. & W. 248. By an old statute any innkeeper, ale-house keeper, victualler, sutler, or other retailer who should sell ale or beer in a vessel not signed, stamped or marked according to the act, or who, in giving any account or reckoning in writing or otherwise, should refuse or deny to give in such account the particular number of quarts or pints of ale or beer for which demand was made, was forbidden for default of payment of the reckoning

to detain any goods or other things belonging to the person from whom the reckoning should be due. (11 & 12 Will. 3, c. 15, s. 2. Rep. 30 & 31 Vict. c. 59.)

(*l*) *The Exeter Carrier's case*, cited by Holt, C. J., 2 Lord Raym. 867.

(*m*) *Lambert v. Robinson*, 1 Esp. 119.

(*n*) *Rushforth v. Hadfield*, 6 East, 519; 7 id. 224; *Aspinall v. Pickford*, 3 Bos. & P. 44, n.

(*o*) *Butler v. Woolcott*, 2 B. & P., N. R. 64.

(*p*) *Middleton v. Fowler*, 1 Salk. 282.

274. The shipowner, like any other carrier, is entitled by law to a lien upon his passenger's goods, including personal luggage, for his passage money (*q*); and upon the goods carried in the ship (so long as they remain undelivered (*r*)) as security for the freight or reward which becomes payable upon the delivery and for the safe carriage of the goods, but not in case of their loss (*s*) (**282**). And if the contract for delivery be completed so far as the shipowner is concerned, but actual delivery is prevented by circumstances arising out of the nature of the cargo, a lien enforceable *in rem* in the Admiralty arises for the cost of storing and bringing them back to the port of shipment (*t*).

This lien binds every part of the cargo in the hands of a single consignee or purchaser (*u*); but if the cargo be sold to different persons, it will not bind the part delivered to one, for the freight of what has been delivered to another (*x*) (**291**).

275. The manner and time of payment for the hire of ships, and the conveyance of their cargoes, are however often the subject of special contracts, in which the word "freight" is not only used in the strict sense above mentioned, but is made to apply to money payable on taking goods on board to be carried on the voyage, and irrespective of the contingency of the ship's safe arrival; and also to the claim for loss of freight, which would have been payable in respect of such cargo as might have been carried by a partly laden ship, if she had been fully laden, and which is commonly known as *dead freight* (*y*). In respect of this there is no lien by law, for no

(*q*) *Wolff v. Summers*, 2 Camp. 631.

(*r*) *North v. Gurney*, 1 Jo. & H. 509.

(*s*) *How v. Kirchner*, 4 Moo. P. C. 21; *Kirchner v. Venus*, 5 Jur., N. S. 395.

(*t*) *Argos Cargo, Ex.*, L. R., 4 Ad. 13; 5 P. C. 134.

(*u*) *Sodergreen v. Flight*, cited 6 East, 622; *Perez v. Alsop*, 3 Fost. & F. 188.

(*x*) See *Bernal v. Pim*, 1 Gale, 17.

(*y*) *Phillips v. Rodie*, 15 East, 547; *Birley v. Gladstone*, 3 M. & S. 205, per

Lord Ellenborough and Le Blanc, J.; *Gladstone v. Birley*, 2 Mer. 401; *Smith v. Sieveking*, 4 E. & B. 952, per Lord Campbell; *M'Lean v. Fleming*, L. R., 2 Sc. App. 128, per Lords Chelmsford and Colonsay. The above is considered to be the result of the authorities as to the meaning given by the courts to the term *dead freight*. In the case of *Gray v. Carr*, L. R., 6 Q. B. 523, several of the learned judges expressed opinions as to Lord Ellenborough's construction of the phrase, which appear to be at

goods being carried there is nothing upon which the lien can attach (*z*). But by contract there may be a lien for it on the cargo actually carried, if the amount be fixed or capable of calculation (*a*); and, it seems, even if the amount be unliquidated (*b*).

276. The questions which usually arise as to the right to a lien under contracts by way of charter-party are, whether they transfer the temporary ownership of the vessel to the charterer; and whether the delivery of the cargo is to precede, follow or be coincident with the payment for the hire of the ship. As to the temporary ownership, the courts, looking at the whole contract and the intention of the parties, will not deprive the owner of his lien because of the use of particular words, which, taken alone, might seem to give the possession to the charterer; even where words of actual demise, such as "let" and "hire," are found in the instrument (*c*); though where there are words large enough to import a demise, and the master is appointed by the charterer, who is responsible for him, and the master receives the freight on the charterer's account, irrespective of the delivery of the cargo and of the payment of the hire of the ship; or where a clear intention to pass the possession to the charterer is otherwise shown, there can be no lien (*d*).

If the shipowner retains possession of the ship, he has a lien for freight made payable either in cash, or by bills on the arrival of the ship, or on or before the delivery of the cargo (*e*); and if

variance with his remarks in the first two cases cited; but with one exception they refrained from stating what they held to be its true meaning. By *Bramwell, B.*, it was said to mean in strictness an agreed sum fixed or capable of calculation, for short loading—but not to include short loading merely—excluding, therefore, it is presumed, unliquidated damages; which, as it appears to have been admitted by *Willes, J.*, in *Pearson v. Goschen*, 17 C. B., N. S. 352, were certainly included by Lord Ellenborough.

(*z*) *Phillips v. Rodie*, *Gladstone v. Birley*, *Birley v. Gladstone*, *supra*.

(*a*) *M'Lean v. Fleming*, *supra*.

(*b*) *Id.* per Lords Chelmsford and Colonsay.

(*c*) *Christie v. Lewis*, 2 Brod. & B. 410; 5 Mo. 211; *Saville v. Campion*, 2 B. & Ald. 503, overruling *Hutton v. Bragg*, 7 Taunt. 18.

(*d*) *Belcher v. Capper*, 4 M. & G. 502; see *Newberry v. Colvin*, 7 Bing. 190.

(*e*) *Tate v. Meek*, 8 Taunt. 280; *Saville v. Campion*, 2 B. & Ald. 503; *Campion v. Colvin*, 3 Bing. N. C. 17;

the freight be payable on the quantity safely delivered alongside, and a receipt to be granted on board, as the master would lose his lien on delivery and receipt, he may refuse to deliver except on daily payment of freight for the amount delivered (*f*) (1595).

277. But the lien does not arise for money payable under a special contract, and not falling within the strict meaning of freight, as a reward for the safe conveyance and *delivery* of goods; unless by the terms of the contract rights are created corresponding to the lien given by law; and if no such rights be created none will be implied by law.

This rule excludes the lien when the money is made payable irrespective of the arrival of the ship, and the safe delivery of the goods, whether it be before the arrival of the ship at the port of discharge (*g*), or after the delivery of the goods (*h*); and although the money be made payable to a person other than the shipowner, who may have made advances on account of the (*quasi*) freight.

278. The goods having been shipped for delivery according to the contract, the shipowner has a right to earn his freight, and for that purpose he may refuse to redeliver them to the charterer until payment of the freight which might have been earned, and until indemnity be given against the consequences arising from any dealings with the bill of lading signed by the master; and these conditions must be performed before the contract, which can only be dissolved by the consent of both parties, can be determined (*i*). This rule appears to be equally applicable to cases in which there is, as to those in

3 Sc. 338; *Faith v. East India Co.*, 4 B. & Ald. 630; *Paynter v. James*, L. R., 2 C. P. 348

(*f*) *Black v. Rose*, 2 Mo. P. C., N. S. 277.

(*g*) *How v. Kirchner*, 11 Moo. P. C. 21; *Kirchner v. Venus*, 12 id. 361, overruling *Gilkison v. Middleton*, 2 C. B., N. S. 134; *Neish v. Graham*, 8 El. & Bl. 505; 4 Jur., N. S. 49.

(*h*) *Lucas v. Nockels*, 4 Bing. 729;

1 Mo. & P. 783; *Alsager v. St. Katharine's Dock Co.*, 14 M. & W. 794; *Foster v. Colby*, 3 H. & N. 705; see *Tamvaco v. Simpson*, 19 C. B., N. S. 453; L. R., 1 C. P. 363.

(*i*) *Tindall v. Taylor*, 4 El. & Bl. 219. In *Thompson v. Small*, 1 C. B. 328, payment was offered and delivery refused, and the refusal was held to amount to a conversion. (See also *Thompson v. Traill*, 2 C. & P. 384)

which, (as it happened in the cases cited), there is not, a lien under the contract for the freight. But it does not apply if the ship having been advertised as a general ship, the goods were sent on board without notice of any charter-party. In such a case, if the shipper after notice of the charter-party refuses to submit to its terms, and has not been guilty of *laches*, the shipowner cannot retain the goods (*k*).

279. Where a charter-party is entered into, under which the shipowner has a lien for a lump sum of freight against the charterer, the lien holds good against goods shipped on account of the charterer, as against an indorsee of the bill of lading for valuable consideration, with notice of the charter-party (*l*). But where the charter-party specifies only a certain rate of freight on the cargo to be carried, the owner's lien is only for the freight due at that rate on the particular goods, and not for the whole balance of freight (*m*). If the master has signed a bill of lading for less freight than is specified in the charter-party, the claim of the owner will, as against an indorsee for value of the bill of lading without notice of the charter-party, be limited to the amount mentioned in the bill of lading (*n*), and if the bill of lading state incorrectly that the freight has been paid, the shipowner is estopped from claiming it against an assignee for value without notice (*o*).

280. If the consignees abroad, with notice of the charter-party, or the charterer's agent, procure cargo on homeward freight consigned to persons who also have notice and take bills payable in a manner inconsistent with a lien, this will not deprive the owner of his lien under the charter-party, and the lien will extend to the goods placed on board by different shippers, to the extent of the freight due on each of those consignments. And if the goods in such a case be purchased and shipped by the consignees abroad on account of the

(*k*) *Peek v. Larsen*, L. R., 12 Eq. 378.

(*l*) *Small v. Moates*, 9 Bing. 574; *Gledstanes v. Allen*, 12 C. B. 202; *Kern v. Deslandes*, 10 C. B., N. S. 205.

(*m*) *Fry v. Chartered Bank of India*, L. R., 1 C. P. 689.

(*n*) *Mitchell v. Scaife*, 4 Camp. 298.
(*o*) *Howard v. Tucker*, 1 B. & Ad. 712.

charterer, though consigned to creditors of those consignees, they will be subject to the owner's lien to the full extent of freight due under the charter-party (*p*). So, if the lading belongs to the charterer, and is subject to the ship owner's lien under the charter-party, the lading, if sold by the charterer after it is put on board, will pass to the purchaser subject to the lien (*q*). And the lien will not be affected by the unauthorized agreement of the master to carry goods for freight payable to other persons than the owner (*r*).

281. Port charges being properly payable by the owner of the ship, he has no lien upon the cargo for such part of them as the freighter has agreed but neglected to pay (*s*); nor for wharfage, where by the contract the goods are deliverable upon payment of the freight (*t*); nor for demurrage either by law, or by virtue of a covenant merely binding the ship and the cargo to be laden on board, for the performance of the contract (*u*), although, as in the case of dead freight, a lien or quasi lien for it may be raised by an express contract (*x*) (275).

282. The master has a possessory lien at common law, as the owner's agent, upon the goods carried, not only for the freight but also for general average (*y*). And although the Court of Admiralty does not take notice of general average for the purpose of giving effect to a lien at the instance of a person seeking to establish it, the court cannot annul, but is bound to act upon the right, where acquired by the master in a case over which the court has jurisdiction (*z*).

(*p*) *Faith v. East India Co.*, 4 B. & Ald. 630; *Campion v. Colvin*, 3 Bing. N. C. 17; 3 Sc. 338.

(*q*) *Small v. Moates*, 9 Bing. 574.

(*r*) *Reynolds v. Jex*, 4 B. & S. 86.

(*s*) *Faith v. East India Co.*, 4 B. & Ald. 630.

(*t*) *Bishop v. Ware*, 3 Camp. 360.

(*u*) *Phillips v. Rodie*, 15 East, 547; *Birley v. Gladstone*, *Gladstone v. Birley*, 3 M. & S. 205; 2 Mer. 401.

(*x*) See *Wegener v. Smith*, 15 C. B.

285; *Chappel v. Comfort*, 10 C. B., N. S. 802; *Francesco v. Massey*, L. R., 8 Ex. 101.

(*y*) *Scaife v. Tobin*, 3 B. & Ad. 523, per Lord Tenterden, C. J., and Parke J.; *Cleary v. M'Andrew*, 2 Mo. P. C., N. S. 216; B. & L. 167, nom. *Cargo ex Galam*; 33 L. J., N. S., Ad. 97.

(*z*) *Cleary v. M'Andrew*, *Cargo ex Galam*, *supra*.

283. The following regulations have been made (*a*) concerning the liens of ship owners:—

If the ship owner gives to the wharf or warehouse owner notice in writing that the goods landed from the ship and placed in his custody are subject to a lien for a specific amount for freight or other charges to the ship owner, the goods will remain so subject in his hands as before the landing thereof; and the wharf or warehouse owner failing to retain them until the lien is discharged is made responsible to the ship owner for any loss thereby occasioned to him (*b*).

284. The lien will be discharged by production to the wharf or warehouse owner of a receipt for the amount claimed, and delivery to him of a copy thereof, or of a release of freight from the ship owner (*c*); or by deposit by the owner of the goods with the wharf or warehouse owner of a sum of money equal to the amount claimed by the ship owner (*d*). And if the person who makes the deposit does not within fifteen days of making it give to the wharf or warehouse owner notice in writing to retain it, stating in the notice the sum, if any, which he admits to be payable to the ship owner, or that he does not admit any sum to be payable, the wharf or warehouse owner may at the expiration of the fifteen days pay over the sum so deposited to the ship owner, and shall by such payment be discharged from all liability in respect thereof (*e*).

But if the person making the deposit does, within fifteen days after making it, give to the wharf or warehouse owner such notice in writing as aforesaid, the latter shall immediately apprise the ship owner of such notice, and shall pay or tender to him out of the deposit the sum, if any, admitted by the notice to be payable, and shall retain the balance, or if no sum is admitted to be payable, the whole of the deposit, for thirty days from the date of the notice; at the expiration of which, unless legal proceedings have in the meantime been

(*a*) Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 68).

(*b*) Sect. 68. For similar provisions respecting goods landed at certain sufferance wharves in the port of London,

see the earlier private act, 11 & 12 Vict. c. xviii, s. 4.

(*c*) 25 & 26 Vict. c. 63, s. 69.

(*d*) Sect. 70.

(*e*) Sect. 71.

instituted by the ship owner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any dispute between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof (*f*).

285. If the lien is not discharged and no such deposit is made the wharf or warehouse owner may, and if required by the ship owner shall, at the expiration of ninety days from the time when the goods were placed in his custody, or if the goods were of a perishable nature at such earlier period as he in his discretion thinks fit, sell by public auction either for home use or exportation the said goods or so much thereof as may be necessary to satisfy the charges afterwards mentioned (*g*).

286. Before making such sale the wharf or warehouse owner shall give notice thereof by advertisement in two newspapers circulating in the neighbourhood, or in one daily newspaper circulating in London, and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharf or warehouse owner or is otherwise known to him, give notice of the sale to the owner of the goods by letter sent by the post, but the title of a bonâ fide purchaser of such goods shall not be invalidated by reason of the omission to send such notice, nor shall any such purchaser be bound to inquire whether such notice has been sent (*h*).

287. In every case of any such sale the wharf or warehouse owner shall apply the monies received from the sale as follows and in the following order:—

(1.) If the goods are sold for home use, in payment of any customs or excise duties owing in respect thereof.

(*f*) Sect. 72.

(*g*) Sect. 73.

(*h*) Sect. 74.

(2.) In payment of the expenses of the sale.

(3.) In the absence of any agreement between the wharf or warehouse owner and the ship owner concerning the priority of their respective charges, in payment of the rent, rates and other charges due to the wharf or warehouse owner in respect of the goods.

(4.) In payment of the amount claimed by the ship owner as due for freight or other charges in respect of the goods.

(5.) But in case of any agreement between the wharf or warehouse owner and the ship owner concerning the priority of their respective charges, then such charges shall have priority according to the terms of such agreement, and the surplus, if any, shall be paid to the owner of the goods (*i*).

Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of the act, the wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power, from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the wharf or warehouse owner are necessary for the proper custody and preservation of the goods, and shall have a lien on the goods for the said rent and expenses (*k*).

288. Nothing in the act contained is to compel any wharf or warehouse owner to take charge of any goods of which he would not otherwise be liable to take charge, or to bind him to see to the validity of any lien claimed by any ship owner under the act (*l*), or to take away or abridge any powers given by any local act to any harbour trust, body corporate or persons, whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods, or to take away or diminish any rights or remedies given to any ship owner or wharf or warehouse owner by any local act (*m*).

(3) *Of the Lien for Labour upon Chattels.*

289. A person by whom a chattel has been improved has a possessory lien thereon for the price of his labour or of his skill,

(*i*) 25 & 26 Vict. c. 63, s. 75.

(*k*) Sect. 76.

(*l*) Sect. 77.

(*m*) Sect. 78.

though it be exercised without actual labour, and for the expenses incurred in the improvement thereof (*n*).

It is necessary for the validity of such a lien that the work, in respect of which it is claimed,—

- (1) Shall have been done at the request or by the rightful authority of the owner of the chattel (*o*).
- (2) Shall have been completely performed (*p*). But if its completion was prevented by the owner of the chattel a lien arises for the value of the work actually done (*q*).

290. The lien is upon the chattel whereon the labour or skill has been bestowed, and not upon that by means whereof the improvement was wrought. Therefore the lien of the conveyancer is upon those documents upon which he has exercised his skill, not upon those which he has used in doing so. And the lien of the stereotype printer upon the printed work; not upon the stereotype plates. So, a person to whom a mortgage deed is delivered that he may receive the debt has no lien upon it for his charge for making the application (*r*).

291. The lien extends to every part of several chattels for the price of the labour bestowed upon all. Hence the lien of the printer is upon all the printed work in his hands for the printing of the whole; and the lien of the tailor upon each part of a suit of clothes for the making of the whole (*s*).

292. If the goods which are subject to the lien belong to several owners, the whole may be detained or the lien may be

(*n*) *Bevan v. Waters*, 3 Car. & P. 520; *Bleaden v. Hancock*, 4 id. 152, per Tindal, C. J.; *Judson v. Etheridge*, 1 Cr. & M. 743, per Bolland, J.

(*o*) *Hollis v. Claridge*, 4 Taunt. 807; *Hiscox v. Greenwood*, 4 Esp. 174; *Castellain v. Thompson*, 13 C. B., N. S. 105.

(*p*) *Pinnock v. Harrison*, 3 M. & W. 533, per Parke, B.

(*q*) *Lilley v. Barnsley*, 1 Car. & K. 344.

(*r*) *Bleaden v. Hancock*, 4 Car. & P. 152; *Steadman v. Hockley*, 15 M. & W. 553; *Sanderson v. Bell*, 2 Cr. & M. 304; 4 Tyr. 244. In *Marks v. Lahde*, 3 Bing. N. C. 408, a lien was claimed on copper plates for money lent and labour in printing from them, but the latter claim was not discussed.

(*s*) *Blake v. Nicholson*, 3 M. & S. 167.

claimed *pro ratâ*; but part cannot be allowed to go free to one owner and the lien be claimed against the residue (*t*).

Partners in trade may have a lien for labour, although one of the firm be part owner of the chattel upon which the work was done (*u*).

293. The liens of the following persons for labour are only specific, viz. :—

The *accountant* upon the books of account, for work done before the bankruptcy of the owner (*v*); the *arbitrator* upon the award, for his fees (*x*); the *auctioneer* upon the goods sold, for the price, and for the charges of sale and commission (*y*); the *cellarer* upon the goods deposited, for the rent (*z*); the *coach-maker* (*a*); *commissioners* for taking acknowledgments, under the Fines and Recoveries Act, upon the deed acknowledged, the certificate of execution, and the affidavit of verification, for their fees (*b*); the *conveyancer* (*c*); the *dyer* (*d*), though his right to a general lien was afterwards held to have been proved (*e*), and in another case was established upon proof of *local* usage in Gloucestershire (*f*); the *farrier* (*g*); the *fuller* (*h*), who is said to be also entitled by the custom of Exeter to a general lien there (*i*); the *horse breaker* (*j*); the *horse trainer*, both

(*t*) *Grant v. Humphery*, 3 Fost. & F. 162.

(*u*) *Franklin v. Hosier*, 4 B. & Al. 341.

(*v*) *Southall, Exp.*, 12 Jur. 576, per Knight Bruce, V.-C.

(*x*) *Regina v. South Devon Ry. Co.*, 15 Q. B. 1043; *Mason v. Stokes Bay Ry. Co.*, 32 L. J., Ch. 110; *Coombs, In re*, 4 Ex. 839, per Parke, B.

(*y*) *William v. Millington*, 1 H. B. 81; *Coppin v. Craig*, 7 Taunt. 243.

(*z*) *Gray v. Chamberlain*, 4 Car. & P. 260.

(*a*) *Houlditch v. Milne*, 3 Esp. 86, per Lord Eldon; *Howes v. Bell*, 7 B. & C. 481.

(*b*) *Grove, Exp.*, 3 Bing. N. C. 304; 3 Sc. 671; 5 Dowl. P. C. 355.

(*c*) *Hollis v. Claridge*, 4 Taunt. 807, per Gibbs, J.; *Steadman v. Hockley*, 15 M. & W. 553.

(*d*) *Green v. Farmer*, 4 Bur. 2214; *Bennett v. Johnson*, 3 Dougl. 387; 2 Chit. 455.

(*e*) *Savill v. Barchard*, 4 Esp. 53.

(*f*) *Close v. Waterhouse*, 6 East, 523 n.

(*g*) *Read v. Burley*, Cr. Eliz. 596; *Rushforth v. Hadfield*, 7 East, 224, per Lord Ellenborough; *Scarfe v. Morgan*, 4 M. & W. 284, per Parke, B.

(*h*) *Rose v. Hart*, 8 Taunt. 499. But the claim to a general lien was negatived upon the construction of the term *mutual credit* in the Bankrupt Act, 5 Geo. 2, c. 30, and not upon the usage of the trade.

(*i*) *Sweet v. Pym*, 1 East, 4.

(*j*) *Judson v. Etheridge*, 1 Cr. & M. 743, per Bolland, B.; *Scarfe v. Morgan*, 4 M. & W. 270, per Parke, B.

for keep and training, unless by contract or custom the owner has rights of user inconsistent with the continued possession of the trainer (*j*); the miller (*k*); the owner of a stallion, for the price of covering a mare, upon the mare (*l*); the parliamentary agent (*m*); the printer (*n*); the salvor of property endangered by perils of the sea (*o*), or recaptured from an enemy (*p*).

The benefit of the lien for salvage extends to the shipowner who has paid, or bound himself to pay, the salvage, in respect of the rateable part to which the cargo is liable (*q*).

This lien is founded upon public policy, and is allowed in respect of the hazardous nature of the service. It therefore does not extend to a reward for, or to the costs of, placing in safety goods which have accidentally drifted from the bank of a navigable river (*r*). Nor does it extend to the salvage of goods detained by, and forcibly recovered from, a neutral power, before the property has been divested from the owners by condemnation (*s*).

The lien for salvage does not entitle a person in possession of a strayed animal to detain it for the cost of its keep (*t*).

The shipwright, for building or repairing the ship, so long as it remains in his possession (*u*), and the tailor (*x*).

294. The right of retainer for general balances, founded upon the lien for labour, has been established in a very few instances.

(*j*) *Bevan v. Waters*, 3 Car. & P. 520; M. & M. 236; *Forth v. Simpson*, 13 Q. B. 681.

(*k*) *Oxenden*, Exp. 1 Atk. 234.

(*l*) *Scarfe v. Morgan*, 4 M. & W. 270.

(*m*) *Ridgway v. Lees*, 25 L. J., N. S., Ch. 584.

(*n*) *Blake v. Nicholson*, 3 M. & S. 167.

(*o*) *Nicholai Heinrich*, 17 Jur. 329.

(*p*) *Two Friends*, 1 Rob. Ad. 272.

(*q*) *Briggs v. Merchant Traders, &c. Association*, 13 Q. B. 167.

(*r*) *Nicholson v. Chapman*, 2 H. Bl. 254; nor will there be any claim for the salvage of it as wreck under the Merchant Shipping Act, 1854, s. 2; *Palmer v. Rouse*, 3 H. & N. 505.

(*s*) *Wilson v. Anderton*, 1 B. & Ad. 450.

(*t*) *Brustead v. Buck*, 2 W. Bl. 1117.

(*u*) *Shank*, Exp. 1 Atk. 234; *Woods v. Russell*, 5 B. & Al. 942; *Vibilia*, 1 W. Rob. 1, per Dr. Lushington; *Bland*, Exp., 2 Rose, 91.

(*x*) *Hostiler's Case*, 5 Edw. 4, E. T., pl. 20, per Haydon, J.; *Blake v. Nicholson*, 3 M. & S. 167.

In some trades, the benefit of the lien is obtained, or attempted to be obtained, by fixing the employer with notice that the claimants will only transact business on the terms of a general lien; but the right to the general lien, independent of such notice and of evidence of usage, has been set up and has failed for want of sufficient evidence, in the cases of the *carrier*, the *fuller*, the *dyer*, and the *miller*; and these, like other workmen, the nature of whose business does not include the advance of money to their employers, have only by law a lien for the price of their labour upon the particular chattel of which it was the subject (*y*), and in the case of the carrier at least the general lien, so far as it can be made out by evidence of usage, is by no means favoured in law.

The *packer*, either on the ground of mutual credit, or because his business is in the nature of that of a factor (*z*) (320), and the *calico printer* (*a*), have been held entitled to liens for general balances; but the lien of the latter is only for the balance due in respect of work done in the particular business; not for money lent, or other collateral matters (*b*).

(*y*) *The Carrier*: *Rushforth v. Hadfield*, 6 East, 519; 7 id. 224; *Wright v. Snell*, 5 B. & Ald. 350; but the usage seems to have been established in *Aspinell v. Pickford*, 3 Bos. & P. 44, note. Unsuccessful attempts were made by carriers, where the custom was for the consignor to pay the carriage, to retain the goods for a general balance as against the consignee (*Butler v. Woolcot*, 2 Bos. & P. N. R. 64); and to retain for the balance of account between the consignee and the carrier, so as to affect the right of the consignor to stop in transitu. Lord Alvanley thought that even an agreement for such a right should not be allowed. (*Oppenheim v. Russell*, 3 Bos. & P. 42.) *The Fuller*: *Rose v. Hart*, 8 Taunt. 499. *The Bleacher*, established at Nottingham, and apparently, by the same evidence, exists at Loughborough: *Plaice v. Allcock*, 2 Fost. & F. 1074.

The Dyer: *Green v. Farmer*, 4 Bur. 2220; *Bennett v. Johnson*, 3 Dougl. 387; *Close v. Waterhouse*, 6 East, 523, note; but see *Savill v. Barchard*, 4 Esp. 53. And per Gibbs, J. the custom had been proved by Mansfield, C. J., Lord Ashburton (Dunning) and himself, in the teeth of *Green v. Farmer*, in which there was no evidence of it, and it was decided that no such custom existed. (5 Taunt. 60.) *The Miller*: *Ockenden, Exp.*, 1 Atk. 235.

(*z*) *Doeze, Exp.*, 1 Atk. 228; per Lord Mansfield in *Green v. Farmer*, 4 Bur. 2222.

(*a*) *Webb v. Fox*; *Peake's Add. Ca.* 167 (1797), *usage proved*; *Andrews, Exp.*, *Cooke's Bkt. Laws*, 288, 423 (1764).

(*b*) *Welden v. Gould*, 3 Esp. 268 (1801), per Lord Kenyon, lien admitted; see *Lilley v. Barnsley*, 1 Car. & K. 344.

295. The *solicitor* has a lien upon a document placed in his hands by a person entitled to dispose of it, for the price of work done thereon (*d*), and also for his general professional charges upon all documents (*e*) or other property (*f*) of the client, which come to his hands in the character of solicitor, while conducting the business, or for the purposes of the client.

This lien arises out of the relation between the client and the solicitor (*g*), and only when the solicitor receives the property in that character and in the performance of his professional duty to his client (*h*). And the rule excludes from the operation of the lien documents received by a solicitor as steward of a manor (*i*), next friend of an infant (*k*), or as transferee of a mortgage paid off by a solicitor out of his own money, and not with the money of his client (*l*). But where he discharges the debt with the client's money given him for the purpose, and thereupon receives the deposited deeds, he receives them in the course of business, and in the performance of his duty to his client, and they become subject in his hands to his general lien (*m*).

A solicitor is not, by the mere holding of an office under his clients, deprived of his specific lien upon documents for the price of work done thereon as solicitor (*n*).

The lien entitles the London agent of a country solicitor to retain documents of the client received from the country solicitor in the progress of his client's business, so long only as the debt due from the client to the country solicitor remains unpaid, or unsatisfied by set-off or otherwise, and only to the extent of the debt due to him from the client in the particular business (*o*). The lien is limited to the sum so due, because the country

(*d*) *Hollis v. Claridge*, 4 Taunt. 807.

(*e*) *Sterling, Exp.*, 16 Ves. 258; *Nesbitt, Exp.*, 2 Sch. & Lef. 279.

(*f*) *Friswell v. King*, 15 Sim. 19.

(*g*) *Pelly v. Wathen*, 1 De G. M. & G. 16.

(*h*) *Stevenson v. Blakelock*, 1 M. & S. 535.

(*i*) *Champernown v. Scott*, 6 Mad. 93.

(*k*) *Anon.*, cited *Mont. Law of Lien*, 53.

(*l*) *Vaughan v. Vanderstegen*, 2 Dr.

409; *Pelly v. Wathen*, 7 Hare, 351;

Gibson v. May, 4 De G. M. & G. 512.

(*m*) *Stevenson v. Blakelock*, *supra*.

(*n*) *The King v. Sankey*, 5 A. & E. 423; 6 Nev. & M. 839.

(*o*) *Bray v. Hine*, 6 Price, 203;

Moody v. Spencer, 2 D. & R. 6; *Waller*

v. Holmes, 1 J. & H. 239; 6 Jur., N. S.

1367; *Dicas v. Stockley*, 7 C. & P. 567; *Andrew, Re*, 7 Il. & N. 87.

solicitor cannot transfer a greater right than he possesses ; and where his debt has been discharged by payment or satisfied by set-off or otherwise when the lien is claimed, the London agent cannot retain the deeds. The courts however will so far assist the agent as to give effect to his notice to the client not to settle behind his back with the country solicitor, of the benefit of whose lien the agent may thus obtain the full advantage.

The lien of the London agent is not affected by a change of the country solicitor (*p*).

296. The solicitor who claims a lien must be the same person to whom the costs, in respect of which it is claimed, are due. This rule excludes from the lien documents held by partners in respect of costs due to one or more of them before the partnership began, and documents held by a member of a dissolved partnership after the dissolution, for costs which were due to the firm (*q*).

297. The solicitor cannot detain documents which he has agreed to hold for a special purpose (*r*), beyond that purpose. A deposit for a special purpose, so as to be free from the general lien, must be by special agreement. If, in the general course of dealing, the client from time to time hands papers to his solicitor, and does not get them again when the occasion that required them is at an end, the conclusion is that they are left with him upon the general account (*s*).

The general lien which the solicitor has upon documents delivered to him for the purpose of conducting a suit (*t*) is limited by the obligation to deliver them up, if they are required for the purposes of the suit (*u*); but he may detain such documents as he has received for general purposes, as well as for the

(*p*) *Ward v. Hepple*, 15 Ves. 297.
(*q*) *Forshaw, In re*, 16 Sim. 121;
Vaughan v. Vanderstegen (Annesley's case), 2 Dr. 409.

(*r*) *Lawson v. Dickenson*, 8 Mod. 306; *Young v. English*, 7 Beav. 10;
Gibson v. May, 4 De G. M. & G. 512.

(*s*) *Sterling, Exp.*, 16 Ves. 257, per Lord Eldon; *Colmer v. Ede*, 40 L. J., Ch. 185.

(*t*) *Balch v. Symes, T. & R.* 87, per Lord Eldon.

(*u*) *Baker v. Henderson*, 4 Sim. 27.

purposes of the suit, if he had a lien thereon antecedent to the rights of the persons claiming in the suit (*x*).

298. The lien is binding to the extent only of the client's interest in the deeds, or in the property to which they relate (*y*). This rule excludes from the right to a lien—The solicitor of a tenant for life as against the remainderman (*z*); the solicitor of one entitled to a portion of a charge as against the other owners of the charge (*a*); the solicitor of a partnership firm as against the private deed of one of the partners (*b*); the solicitor of a mortgagee, after the discharge of the mortgage (whether a reconveyance have been executed or not), in respect of costs due from the mortgagee (*c*); the solicitor of the official liquidator of a public company upon the proceedings and documents relating to the winding-up (*d*) (**261**).

Notwithstanding this rule a solicitor in possession of deeds of a mortgaged estate may hold them against a purchaser, subject to the mortgage, for costs due in respect of the mortgage, whether they be payable by the mortgagor or the mortgagee (*e*).

The solicitor of an executor has a lien upon the deeds^{*} of the testator for the executor's costs of the suit, unless the executor be indebted to the testator's estate (*f*).

It has however been held at law that the trustees of an estate devised to one for life with remainder over, and who employ a solicitor in causes relating to the estate, cannot give him an effectual lien on the deeds for the costs as against the remainderman (*g*).

299. The lien of the solicitor is subject to any equities to which the deeds were subject in the hands of the client when

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| (<i>x</i>) Warburton v. Edge, 9 Sim. 508. | N. S. 276; Plumtre v. O'Dell, 1 Ir. Eq. R. 113. |
| (<i>y</i>) Hollis v. Claridge, 4 Taunt. 806; | |
| Bell v. Taylor, 8 Sim. 216. | (<i>d</i>) Union Cement and Brick Co., |
| (<i>z</i>) Nesbitt, Exp., 2 Sch. & Lef. 279; | Re, L. R., 4 Ch. 627. |
| Davies v. Vernon, 6 Q. B. 443. | (<i>e</i>) Ogle v. Storey, 4 B. & Ad. 735; |
| (<i>a</i>) Molesworth v. Robins, 2 J. & L. | 1 N. & M. 474. |
| 358. | (<i>f</i>) Turner v. Letts, 7 De G., |
| (<i>b</i>) Turner v. Deane, 3 Ex. 836. | M. & G. 248. |
| (<i>c</i>) Wakefield v. Newton, 6 Q. B. | (<i>g</i>) Lightfoot v. Keane, 1 M. & W. 745. |

the solicitor received them, although he had no notice thereof (*h*), and subject to any future interests acquired by other persons as to costs incurred after the commencement thereof (*i*). The interest of a subsequent judgment creditor is a future interest within this rule (*h*). And the lien will not arise against the owner of prior equities, though the costs have been partly incurred for his benefit, unless he actually employed the solicitor (*l*).

300. The lien binds those persons only by or on whose behalf the solicitor was properly employed, and the persons who claim under them.

This rule excludes the lien of the solicitor of a company in respect of business transacted for the directors in plain excess of their powers (*m*), though he may have his lien upon monies in his hands which have been recovered in actions arising out of such business; and the lien upon deeds which have been delivered for examination to an intended mortgagee, who delivers them for that purpose to his solicitor, although the intended mortgagor has promised to pay the costs of the investigation (*n*). Because the loan not being effected the solicitor has no lien against the owner of the deeds, though he promised to pay all the expenses; for the solicitor was employed by the proposed lender, and the borrower's promise raised no privity between him and the solicitor. Even where the mortgage is completed, though in practice the solicitor is paid out of the money received by the borrower, there is no lien between him and the solicitor, the business being done on the credit of the lender, against whom an action will lie for the costs (*o*).

In the converse case where the mortgagor delivers the deeds to his own solicitor that he may obtain a loan on transfer, the

(*h*) *Marsh v. Bathoe*, Ridg. Ca. t. Hardwicke, 256; *Pelly v. Wathen*, 7 Hare, 351; 1 De G. M. & G. 16; *Smith v. Chichester*, 2 Dr. & W. 393.

(*i*) *Blunden v. Desart*, 2 Dr. & W. 405.

(*l*) *Id.*

(*l*) *Pelly v. Wathen*, *supra*.

(*m*) *Phoenix Life Assurance Co.*, In re, 1 H. & M. 433.

(*n*) *Pratt v. Vizard*, 5 B. & Ad. 808; 2 N. & M. 455.

(*o*) *Id.*; *Lawson v. Dickenson*, 8 Mod. 306.

solicitor cannot hold them against the mortgagee, by whom he was not employed (*p*).

301. The solicitor of the mortgagee, on the other hand, cannot after reconveyance (*q*), or even after discharge of the mortgage without reconveyance (*r*), hold the deeds as against the mortgagor as security for the mortgagee's costs, because the mortgagee cannot, by handing the deeds to his solicitor, create a new lien against the mortgagor in respect of his own debt; but the mortgagee's solicitor may hold against a purchaser, subject to the mortgage, for costs due in respect of the mortgage, whether properly payable by the mortgagor or the mortgagee; for the purchaser should ascertain by whom the deeds are held before payment of his purchase-money (*s*).

Where the mortgagor obtained the deeds from the mortgagee and placed them in the solicitor's hands to enable him to sell in fraud of the mortgagee, it was held (*t*) that the lien only covered the costs of the particular sale, as to extend it to general costs would be to enable the solicitor to profit by the fraud of his client. The trustees of a marriage settlement are persons claiming under the employer of a solicitor against whom he may claim his lien (*u*).

302. The solicitor's right is not the same when he refuses any longer to conduct the client's business as when the client discharges him.

In the former case he is not suffered to keep the documents so as to hinder the transaction of the client's business, or the recovery of property, for which production of the papers is necessary. The solicitor indeed retains his lien in such a case, but under the condition that the client be put to no greater trouble, delay or expense than if the relation of solicitor and client remained undissolved. And this condition not being satisfied (*x*) by merely giving the client and his

(*p*) *Hutchinson v. Joyce*, 2 Joh. 122.

(*q*) *Wakefield v. Newbon*, 6 Q. B., N. S. 276.

(*r*) *Plumtre v. O'Dell*, 1 Ir. Eq. Rep. 113.

(*s*) *Ogle v. Storey*, 4 B. & Ad. 735.

(*t*) *Young v. English*, 7 Beav. 10.

(*u*) *Gregon, Re*, 26 Beav. 87.

(*x*) Per Lord Eldon, *Colegrave v. Manley*, T. & R. 400; *Rawlinson v.*

new solicitor free access to, with liberty to inspect and copy, the papers, the solicitor who claims the lien will be ordered to deliver to the new solicitor such of the documents as the latter, on inspection, shall deem necessary for the purposes of the suit, without prejudice to the lien, and with an undertaking to return them undefaced within a specified time after the hearing (*y*); to which, where there were conflicting opinions as to the propriety of prosecuting the suit, the court has added an undertaking on the part of the new solicitor to prosecute the cause with all due diligence (*z*). Where the papers were not those of a particular client, but were retained against a country solicitor by his London agent, an undertaking was required to re-deliver them if the court should so order (*a*); but where the agent had refused either to proceed with the business or to hand over the papers, a summary order for delivery, without waiting until payment of his costs, was made against him (*b*).

303. The rights of the solicitor are affected by this rule where he refuses to proceed because the client does not supply him with funds to carry on the suit (*c*); or on the ground of dispute as to the manner and extent of his remuneration (*d*); and acts of misconduct on his part, in consequence of which the court considers that he ought no longer to remain in the relation of solicitor, or his imprisonment, by reason of which he can no longer carry on the business, are treated as equivalent to a discharge by the soli-

Moss, 7 Jur., N. S. 1052, though Sir J. Leach seems to have treated access and inspection as sufficient to satisfy the client's rights. (*Moir v. Mudie*, 1 Sim. & St. 282.) But note the difference as to delivery or taking copies between ordinary papers in a cause, and deeds which have an intrinsic value that cannot be given to copies. (2 Hare, 590.)

(*y*) *Colegrave v. Manley*, *supra*, and form of order there; *Lord v. Wormleighton*, Jac. 580; *Heslop v. Metcalfe*,

3 M. & C. 183; *Wilson v. Emmett*, 19 Beav. 233; see *Bozon v. Bolland*, 4 M. & C. 354; *Griffiths v. Griffiths*, 2 Hare, 590; *Huntley v. Anglo-Californian, &c. Co.*, 1 Fost. & F. 211.

(*z*) *Cane v. Martin*, 2 Beav. 584.

(*a*) *Smith, Re*, 4 Beav. 309.

(*b*) *Walton, Re*, 4 K. & J. 78.

(*c*) *Heslop v. Metcalfe*, 3 M. & C. 183; *Robins v. Goldingham*, L. R., 13 Eq. 440.

(*d*) *Wilson v. Emmett*, 19 Beav. 233.

citor of himself (*e*). So is the dissolution of a partnership between solicitors, because the client having stipulated for the services of both is not obliged to trust to the care of one only; and in such a case it is immaterial (*f*) that only one of the partners has principally conducted the client's business. The bankruptcy of the firm of solicitors is also a discharge by themselves (*g*).

304. A new solicitor, who is employed in a suit or in any conveyancing or other matter, may demand the papers for the purpose of conducting it; but when the suit or matter is at an end, the lien of the former solicitors revives, and the papers cannot be touched for any new purpose, without payment of what is due to them. Before delivering the papers for the limited purpose, the former solicitors are also entitled to an affidavit that the papers are wanted for the completion of the business in which the firm was employed at the time of the dissolution, and in respect of which the papers came into their possession (*h*).

305. Where a solicitor dies, the full benefit of the lien is given to his representatives, because the proceedings are not delayed by any default of the solicitor. It seems, however, that the court has jurisdiction over the representatives (*i*).

306. On the other hand, when the client discharges the solicitor (*k*), the latter will not be compelled to afford any

(*e*) *Smith*, Re, 4 Beav. 309; *Williams*, Re, 6 Jur., N. S. 908; but see *Smith*, Re, 9 W. R. 396.

(*f*) *Griffiths v. Griffiths*, 2 Harc, 587; and see *Cholmondeley v. Clinton*, 19 Ves. 273; *Rawlinson v. Moss*, 7 Jur., N. S. 1052.

(*g*) Per Lord Romilly, M. R., L. R., 2 Eq. 345, *Moss*, Re.

(*h*) *Rawlinson v. Moss*, 7 Jur., N. S. 1052.

(*i*) *Redfearn v. Sowerby*, 1 Sw. 84.

(*k*) *Lord v. Wormleighton*, Jac. 580; *Bozon v. Bolland*, 4 Myl. & Cr. 354,

per Lord Cottenham; *Faithfull*, Re, L. R., 6 Eq. 325, explaining *Bevan*, Re, 33 Beav. 439. In *Simmonds v. Great Eastern Rail. Co.*, L. R., 3 Ch. 797, the L.J.J. held, but partly on the circumstances of the case, that where the solicitor of the plaintiff had been discharged by his assignee in bankruptcy he must produce the documents necessary for drawing up the decree (which had been made without opposition), notwithstanding his lien for costs. It was intimated that the case was almost within the principle that the solicitor's

facilities to the client by giving access to the papers, which the solicitor may retain until payment of his general costs. And on the bankruptcy of his client he is in the same position as if discharged otherwise than by his own act or fault; the right of the assignees not being greater than that of the bankrupt, no order to produce or give a copy on payment of the costs relating to the required document only, will then be made (*l*). The circumstance that one of the members of the client's firm which has become bankrupt is also one of the firm of solicitors, does not, where the latter firm remains solvent, alter the ordinary rule which arises on the bankruptcy of the client (*m*). The same rule entitles the solicitor of a company to resist an order for production of documents in his hands on the winding-up of the company, notwithstanding the provisions of the winding-up act authorizing an order against every person to produce the documents in his possession (*n*).

If however the solicitor voluntarily produce the papers as evidence in a cause, he cannot therefore claim a lien upon the fund recovered in the cause, though the production was essential to the obtaining of the decree; for he cannot thus by his own act create a lien upon the fund, which would be as extensive as that upon the deeds, viz., for general professional charges; the ordinary lien upon a fund being only for the

lien cannot intercept the completion of an order of the court; but the court adopted a distinction suggested by counsel, between the dismissal of the solicitor by the executor of the client (as in *Lord v. Wormleighton*, supra) and the dismissal by his assignee in bankruptcy (as in *Ross v. Laughton*, Jac. 580), which latter case they considered had not been, as was commonly supposed, overruled by the former case. But their lordships must have overlooked the fact that Lord Eldon himself said, in deciding *Lord v. Wormleighton*, that he was stating an opinion contrary to what he thought when the cases cited (of which *Ross v. Laughton* was one) were before him, and that

Lord Cottenham (4 M. & C. 358) also said the decisions were contrary; nor is there anything in Lord Eldon's judgments to support the distinction, which also appears to conflict with the cases next cited. It is also submitted that the solicitor's right depends upon his own merits arising from his former exertions and outlay, and his subsequent dismissal without misconduct, and not upon the accident whether his late client's interest has vested in his executor or his assignee in bankruptcy.

(*l*) *Underwood, Exp.*, De G. 190.

(*m*) *Moss, Re*, L. R., 2 Eq. 345.

(*n*) *Oxford, &c. Rail. Co.*, Re, 1 De G. & S. 728; 18 L. J., N. S., Ch. 247.

costs of the suit in which it was recovered. The lien is not changed or transferred by the production of the deed, though its value may be gone (*o*).

307. The solicitor's right is limited by the lien; and if a new solicitor be appointed during the progress of a suit the former one has no right to require the proceedings to be suspended until payment of his bill (*p*). And if the solicitor, though discharged by the client, have not delivered his bill of costs within the month required by the order for taxation, he will be compelled to hand over the papers without prejudice to his lien, especially if the papers required are not all which he holds, and if he have a balance in hand towards payment of his demand; because by disregarding the obligation to deliver his bill he has disintitiled himself to the full benefit of his lien (*q*).

An offer by a solicitor to proceed with the cause, after he has discharged himself by assigning his business, will not prevent the order for delivery (*r*).

308. The lien of the solicitor is only a right between his client and himself (*s*); if the client be bound to produce a deed for the benefit of a third person, so also must the solicitor notwithstanding his lien. But although production will be ordered of a deed for the purposes of evidence on subpoena, on behalf of a person whose interests are affected by it, and who is not liable to pay the debt in respect of which the lien is claimed, such an order for production will not extend to delivery or be made so as otherwise to prejudice the lien (*t*); and where the solicitor's lien is collateral to the cause he will not be compelled to produce by an order in the cause,

(*o*) *Perkins v. Bradley*, 1 Hare, 219; *Bozon v. Bolland*, 4 M. & C. 354; *Hall v. Laver*, 1 Hare, 571. It seems to be otherwise where production is ordered.

(*p*) *Merewether v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, id. 195; *O'Dea v. O'Dea*, 1 Sch. & Lef. 315.

(*q*) *Cooper v. Hewson*, 2 Y. & C. C. C. 515.

(*r*) *Colegrave v. Manley*, T. & R. 400.

(*s*) *Furlong v. Howard*, 2 Sch. & Lef. 115; *Ley v. Barlow*, 1 Ex. 800; *Lockett v. Cary*, 10 Jur., N. S. 144.

(*t*) *Brassington v. Brassington*, 1 Sim. & St. 455; *Hope v. Liddell*, 20 Beav. 438; 7 De G., M. & G. 331; 24 L. J., N. S., Ch. 638; 1 Jur., N. S. 665; *Cameron's Coalbrooke Rail. Co., Re*, 25 Beav. 1; see *Vale v. Oppert*, L. R., 10 Ch. 340.

but must be served with a subpoena duces tecum (*u*). The person who is liable to the debt, claiming the deed for his own purposes, may be denied access to it until payment of the claim (*v*). Nor will any lien be a protection against the liability to produce a deed which it is the object of the suit to impeach (*x*) (462).

Again, if the property of the client be in danger of loss by the detention of the papers, it seems the court will order delivery, that the property may be secured and brought into court (*y*). And the lien will not be suffered to interfere with the management of an estate which is being administered by the court (*z*); or to intercept the completion of an order of the court, which will be ordered to be produced to the proper officer for completion, and to be returned when complete to the claimant, who is allowed costs for his attendance; and he will be declared entitled to a lien on any fund in court, or to be paid in the cause, for the amount of his bill of costs (*a*).

If an order be made in a suit by an infant plaintiff by his next friend, for the deposit of the deeds in court for the purpose of discovery, and the plaintiff having attained his majority repudiate the suit before the hearing, the deeds will be ordered to be redelivered to the defendant by whom they were deposited, without regard to any claim by the plaintiff's solicitor for a lien for his costs, even assuming that a lien could be acquired under such circumstances: because the repudiation relates back to the commencement of the suit, and prevents the right of the holder of the deeds to dispose of them from being affected by it (*b*).

309. Where deeds deposited in the solicitor's hands, only for the purposes of the suit, are directed to be given up by the decree, the solicitor being unable to acquire any lien on them after the commencement of the suit, and having no prior lien,

(*u*) *Busk v. Lewis*, 6 Mad. 29.

(*v*) See *Brassington v. Brassington*,
Hope v. Liddell, and *Cameron's, &c.*
Co., *In re*, *supra*.

(*w*) *Balch v. Symes*, T. & R. 87.

(*y*) *Richards v. Platel*, Cr. & Ph. 79;
5 Jur. 834.

(*z*) *Belaney v. Ffrench*, L. R., 8 Ch.
918.

(*a*) *Clifford v. Turrill*, 2 De G. & S.
1; and see *Benyon v. Amphlett*, 8 Jur.,
N. S. 759.

(*b*) *Dunn v. Dunn*, 1 Jur., N. S. 122;
3 Drew. 17; 7 De G., M. & G. 25.

will be ordered to deliver them unconditionally (*c*); but otherwise if they did not come into his possession for the purposes of the cause only, but for those and other purposes: and if the lien claimed be for other matters besides the costs of the suit, and for costs incurred prior to the right of the person who seeks the delivery of the deeds (*d*).

310. Where a person is ordered to produce documents in the hands of his solicitor, who claims a lien upon them, the client must discharge the lien, and produce the deeds (*e*). And if there be a difficulty in getting possession of them, as if the person on whom the order is made be bankrupt and unable to discharge the claim, the order will still be made, with liberty to apply to the court for relief if it cannot be obeyed (*f*); or the court will from time to time enlarge the period for production, so as to enable the party to recover the possession of the deeds (*g*).

It has been said (*h*) that this course will be followed where deeds belonging to a trust have come to the solicitor's hands, and he claims to hold them subject to a lien. But if a solicitor receive documents, with notice that they belong to a trust, he incurs an immediate liability to those for whom his client was trustee, and is subject to the same remedies as the trustee himself for recovering possession of the deeds (*i*).

In such a case it seems that the court has jurisdiction upon petition to order delivery of the deeds; but in some cases (as probably where the deeds are not in the solicitor's hands by reason of his employment as trustee but in some other way, and it would seem without notice of the trust) it may be necessary to make the solicitor a party to the suit (*k*).

(*c*) *Baker v. Henderson*, 4 Sim. 27; *Bell v. Taylor*, 8 Sim. 216; and see *Smith v. Chichester*, 2 Dru. & War. 393.

(*d*) *Warburton v. Edge*, 9 Sim. 509.

(*e*) *Shaw, Exp.*, Jac. 271; see *Liddell v. Norton, Kay*, xi.

(*f*) *Rodick v. Gandell*, 10 Beav. 270.

(*g*) *Goodchap v. Weaving*, 16 Jur.

586, as in the case of an executor whose books are in a distant country. (*Freeman v. Fairlie*, 8 Mer. 44.)

(*h*) *Goodchap v. Weaving*, *supra*.

(*i*) *Francis v. Francis*, 2 De G., M. & G. 73.

(*k*) *Goodchap v. Weaving*, *supra*, and see *Rider v. Jones*, 2 Y. & C. C. 329.

311. Where the committees of a lunatic, who were ordered to raise money on mortgage, were prevented from completing the security by the claim of solicitors to retain the deeds under a lien, it was ordered that the proposed mortgagees should be at liberty to pay the committees sufficient to enable them to discharge the lien, without prejudice to the lunatic's right to have the bill of costs taxed and the accounts investigated (*l*).

312. Courts of law have generally refused to exercise their summary jurisdiction over attorneys by compelling them to deliver up documents, where, there being no cause in court, nor any criminal conduct imputed to the attorney, the matter had been the proper subject of a bill in equity or of an action at law. And the rule was laid down, that where an attorney was employed in a matter wholly unconnected with his professional character, the court would not interfere in a summary way to compel him to execute the trust reposed in him; but where the employment was so connected with his professional character as to afford a presumption that it formed the ground of his employment by the client, there the court would exercise its jurisdiction (*m*). An application against an attorney holding the documents as a steward has on this ground been refused (*n*). But the order was made where it was clear there could be no lien (*o*).

The jurisdiction was also exercised by courts of equity where the documents were received by the solicitor in the way of his business (*p*).

(*l*) *Davies, In re (a lunatic)*, 12 L. J., N. S., Ch. 456.

(*m*) *Per Abbott, C. J., Aitkin, Re*, 4 B. & Ald. 47; see *Cocks v. Harman*, 6 East, 404. Professedly followed in *Re Lowe*, 8 id. 237, though the employment seems to have been that of an attorney. (See *Millard, In re*, 1 Dow, P. C. 140.) And in *Hughes v. Mayre*, 3 T. R. 275, the attorney, as steward of a manor and receiver, was ordered to deliver.

(*n*) *Cocks v. Harman, supra*.

(*o*) *Sharpe, Re*, 1 Dow, P. C. 432.

(*p*) *Earl of Uxbridge, Exp.*, 6 Ves. 425; *Murray, In re*, 1 Russ. 519. So in the exercise of the general jurisdiction over solicitors. (*Blanchard, In re*, 3 De G., F. & J. 131.) In an Irish case, where a lien was disputed, the solicitor was ordered at the hearing to bring the deeds into court without prejudice to his lien, and an inquiry was directed as to its existence and extent. (*Walcott v. Graves*, 11 Ir. Eq. Rep. 396.)

Where a deed was in the hands of an attorney as a party and trustee, a court of law, even on his submission to do so, would not order him to deliver it (*q*).

Where the solicitor's claim to a lien on the deed of a bankrupt is disputed, the remedy of the assignees for the recovery of the deed is by action of trover (*r*).

A solicitor on discharge of his bill is bound to deliver up all drafts and copies for which his client has paid as well as original documents (*s*).

313. The courts and judges have power, where they are authorized to refer the bill of an attorney or solicitor for taxation, to make an order for the delivery by him, his executor, administrator or assignee of the bill, and for the delivery of deeds, documents or papers in his possession, custody or power, or otherwise touching the same, as was done by such courts or judges where any such business had been transacted in the court in which such order was made (*t*).

314. After an order has been made for winding up a company under the Companies Act, 1862 (*u*), the court may require any officer of the company, or person whom it is empowered to summon for the purpose of giving information as to the affairs of the company, to produce any books, papers, deeds, writings, or other documents in his custody or power, relating to the company, without prejudice to any lien claimed by such person thereon, and has power to determine all questions relating to such lien. The solicitors of the company are liable under this provision to produce documents relating to the company on the summons of the official liquidator (*x*).

(4) *Of Liens for Debts incurred in the course of Trade.*

315. An agent who carries on business in his own name, with the stock and for the benefit of his employer, has a specific

(*q*) *Pearson v. Sutton*, 5 Taunt. 304.

& 7 Vict. c. 72, s. 37.

(*r*) *Llewellyn, Re*, 8 Jur. 816.

(*u*) 25 & 26 Vict. c. 89, s. 115.

(*s*) *Horsfall, Exp.*, 7 B. & C. 528.

(*x*) *Paine & Layton, Exp.*, L. R., 4

(*t*) *Attornies and Solicitors Act*, 6 Ch. 215.

lien upon the property in his possession, as an indemnity against liabilities incurred in respect of the business (*y*). And an agent who, with or without the authority of his principal, enters into a contract is entitled to a lien for the expenses incurred in the performance of the contract, upon the proceeds thereof coming to his hands, if in the latter case the contract be adopted by the principal (*z*). But a mere agent, to whom property belonging to his principal has been delivered for his use, has not a lien thereon in respect of a liability voluntarily incurred by the agent without the direction or knowledge of the principal (*a*).

316. A ship's husband, who is agent for the owners, has a lien upon the freight and cargo for his disbursements (*b*).

317. The master of a ship has no possessory lien upon the ship or freight for the cost of repairs, supplies, or other expenditure or debts incurred on account of the ship in England or on the voyage, or for premiums paid by the master abroad for procuring the cargo (*c*).

318. An army agent has a lien upon an officer's money in the agent's hands for advances to the officer for his outfit, although the advances were misapplied and the officer was under age (*d*).

319. An agent has no right of general lien arising out of the mere relation of principal and agent, but only as arising from dealings in a particular trade, in which the right of general lien has been judicially proved and acknowledged; or proved by express evidence of an established custom (*e*).

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|---|--|
| (<i>y</i>) <i>Foxcraft v. Wood</i> , 4 Russ. 487. | L. C., 13 Ves. 594); <i>Smith v. Plummer</i> , |
| (<i>z</i>) <i>Bristowe v. Whitmore</i> , 9 H. L. C. | 1 B. & Ald. 575; <i>Lister v. Payn</i> , 11 |
| 321, per Lord Campbell. | Sim. 348. |
| (<i>a</i>) <i>Gurney v. Sharp</i> , 4 Taunt. 242. | (<i>d</i>) <i>Lawrie v. Banks</i> , 4 Jur., N. S. |
| (<i>b</i>) <i>Harris v. Reynolds</i> , 4 W. R. 278. | 299. |
| (<i>c</i>) <i>Wilkins v. Carmichael</i> , 1 Dougl. | (<i>e</i>) <i>Rock v. Gorrisen</i> , 2 De G., F. & |
| 101; <i>Hussey v. Christie</i> , 9 East, 426 | J. 434, per Lord Campbell. |
| notwithstanding opinion of Lord Eldon, | |

320. A factor has a specific lien upon goods bought for the purchase-money (*f*) and for customs dues, or salvage (*g*) and freight (*h*) paid in respect thereof.

A factor, to whom goods are consigned with authority to sell in his own name, has a lien on the goods during his possession of them, and, when they are sold, upon the purchase-money, as a security for the general balance due to him from his principal, including such advances as he may have made, and such liabilities as he may have incurred, on the principal's account in the course of the business (*i*). If he become possessed of the goods before the principal's bankruptcy, and is selling them at that time, he may retain the purchase-money in payment of his general lien, though it be not received till after the bankruptcy (*k*), and if the purchaser be indebted to the factor, a settlement of accounts between the purchaser and the factor, or his assignees, will bind the principal (*l*).

Where factors at the request of the principal, and after his bankruptcy at the request of his assignees, delayed the sale of goods in their hands upon which they had a lien, they were allowed to retain out of the proceeds of the sale interest on the debt accruing after the bankruptcy, notwithstanding the rule in bankruptcy that interest stops at the date of the fiat (*m*). Payment by a factor of part of the freight of goods, does not constitute such a constructive possession as will support a lien (*n*). A factor (*o*) or broker (*p*) who sells on behalf of another factor or broker, knowing his character, but without authority from the principal to act in his place, has no lien as against the principal upon the proceeds of the goods, for the payment of freight or other dues, or in discharge of his own acceptances on account of the goods.

(*f*) *Emery, Exp.*, 2 Ves. 674.

(*g*) *Paul v. Birch*, 2 Atk. 622, per Lord Hardwicke.

(*h*) *Good, Exp.*, 3 M. & A. 246.

(*i*) Per Lord Mansfield, in *Godin v. London Assurance Co.*, 1 Bur. 490; *Baring v. Currie*, 2 B. & Ald. 137; *Drinkwater v. Goodwin*, 1 Cowp. 251; *Kinloch v. Craig*, 3 T. R. 119, 783;

Hammond v. Barclay, 2 East, 227.

(*k*) *Robson v. Kemp*, 4 Esp. 236.

(*l*) *Hudson v. Granger*, 5 B. & Ald. 27.

(*m*) *Kensington, Exp.*, 1 Dea. 58.

(*n*) *Kinloch v. Craig*, *supra*.

(*o*) *Solly v. Rathbone*, 2 M. & S. 298.

(*p*) *Cockran v. Irlam*, 2 M. & S. 301.

321. The regulations made by the Factors' Acts concerning pledges and liens will be noticed hereafter (430). A wharfinger has a lien, resembling that of a factor, upon the goods in his possession for the general balance due to him for freight and wharfage (*g*); but claims for warehouse room and labourage depend upon evidence of undisputed usage; and if the right be disputed where the wharfinger's business is carried on, he can only claim under special agreement or after previous notice to the customer of the terms upon which the business is conducted (*r*). And in the character of a shipping agent or warehouse keeper a wharfinger has no general lien unless by contract (*s*). A wharf or warehouse owner has a lien for his rent upon goods placed in his custody under the Merchant Shipping Amendment Act, 1862; and for the expenses of such reasonable acts as in his judgment are necessary for their custody and preservation (*t*).

322. A broker, who merely sells on account of his principals, has not like a factor the possession which is necessary to give him a lien. If he sell, and the goods are delivered to him for the use of his employers, his possession is theirs; and if he have paid money on their account without direction from or notice to them, he cannot claim a lien for the outlay (*u*). But if a broker advance money and give acceptances on the credit of goods lodged in his hands by consignees, the owner cannot claim them without both paying his advances and indemnifying him against the outstanding bills, in respect of which the mere counter acceptances of the owner will not be sufficient indemnity (*x*). And if he accept bills for merchants already indebted to him on a running account, on the merchants undertaking to assign him a cargo of which they are

(*g*) *Naylor v. Mangles*, 1 Esp. 109; *The King v. Humphrey*, M'Clel. & Y. 173, 188; *Spears v. Hartley*, 3 Esp. 81.

(*r*) *Holderness v. Collinson*, 1 M. & R. 55; 7 B. & C. 212. See *Dresser v. Bosanquet*, 4 B. & S. 460, 486.

(*s*) *Bowman v. Malcolm*, 11 M. & W. 833, per Parke, B.

(*t*) 25 & 26 Vict. c. 63, s. 76.

(*u*) See *Baring v. Currie*, 2 B. & Ald. 137; *Gurney v. Sharp*, 4 Taunt. 242.

(*x*) *Pulteney v. Keymer*, 3 Esp. 182.

consignees, he has a lien on the cargo for the general balance due to him from the merchants (*y*).

An insurance broker has a lien upon a policy effected by him in that character for the premiums paid thereon, and also for his general balance, both by the custom of London (*z*) and by general usage (*a*).

A broker who effects a policy by the direction of an agent (*b*), without notice that he is not the principal, has a lien as against the real principal, and may apply in satisfaction of that balance money received on the policy as well before as after notice of the right of the latter, because the broker gave credit to his immediate employer as the real owner of the goods. And the burthen of showing that the broker had notice of the agency lies on the real principal (*c*). For the same reason, a broker who buys goods under the direction of an agent, without notice of the agency, has a lien upon them as against the real principal for the purchase-money (*d*). And a purchaser who buys from a factor, without notice that he is so, has a lien for his general balance due from the agent (*e*).

When a broker effects a policy by the direction of an agent with notice of the agency, he has no lien upon the proceeds for his general balance (*f*) against the agent, because it is clear that he cannot pledge his principal's property for his own private debt; but he has a lien for the premiums and for the commission on the policy (*g*). And the principal, or his assignee, cannot recover the policy from the broker, if the factor be entitled to a lien as against the principal; in such a case the broker will be considered to be holding as the servant

(*y*) *Barber, Exp.*, 3 M., D. & De G. 174.

(*z*) *Hewison v. Guthrie*, 2 Bing. N. C. 755.

(*a*) *Levy v. Barnard*, 2 J. B. Moore, 34, 8 Taunt. 149; *Whitehead v. Vaughan*, Cooke's Bank. Law, 566, ed. 5. But as to the custom of London, see per Tindal, C. J., in *Hewison v. Guthrie*, 2 Bing. N. C. 755; and see *Bosanquet, Exp.*, De G. 432; *Power v. Butcher*, 5 Man. & R. 327.

(*b*) *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, id. 349.

(*c*) *Westwood v. Bell*, *supra*.

(*d*) *Taylor v. Kymer*, 3 B. & Ad. 320.

(*e*) *Rabone v. Williams*, 7 T. R. 360, n.; *Stracey v. Deey*, id. 361, n.; *George v. Clagett*, id. 359.

(*f*) *Maans v. Henderson*, 1 East, 335.

(*g*) *Snook v. Davidson*, 2 Camp. 218.

of the factor, and will be entitled to retain in that character till the factor's claim be satisfied (*h*).

323. A banker or other person who has advanced money on a bill for a customer, or has accepted a bill for the accommodation of another, may, if his account be overdrawn, retain the bill or any money in the hands of the discountor or lender belonging to the person accommodated to answer the outstanding bill, or until an indemnity be given against it, although the remedy on the bill itself be barred by the Statute of Limitations (*i*); and although, at the time of acceptance, the person accommodated had committed a secret act of bankruptcy upon which a commission afterwards issued (*k*). And the acceptor has been allowed to retain the full amount of bills accepted where, after they fell due and before an act of bankruptcy by the drawer, the holders of the bills, in order to relieve the acceptor from responsibility (which intention was proved), delivered up the bills to him on payment of a composition, on the ground that the bankrupt and his assignees had received the full benefit of the discharge of the bills, and that the composition was made for the relief of the acceptor (*l*).

Where property has once been appropriated for the payment of bills, though the appropriation was for the benefit of the acceptor, the holder of the bills has an equity in case of the bankruptcy (whether it be a judicial bankruptcy or not) (*m*), of the principal debtor and the person indemnified, to the benefit of the contract between them, by virtue of which he is entitled to a specific application of the fund in discharge of the bills (*n*).

(*h*) *Man v. Shiffner*, 2 East, 523.

(*i*) *Madden v. Kempster*, 1 Camp. 12; *Morse v. Williams*, 3 id. 418; *Bolland v. Bygrave, Ry. & Moo.* 271; *Giles v. Perkins*, 9 East, 18, per Lord Ellenborough: The London banker has a lien on a bill deposited with him, though not endorsed; whereas the county banker, who, it is said, always takes the bill indorsed, has not only a lien but a legal remedy on the bill by the indorsement. But neither has any lien till the account is overdrawn.

(*k*) *Wilkins v. Casey*, 7 T. R. 711; per Lord Ellenborough in *Willis v. Freeman*, 12 East, 659.

(*l*) *Stonehouse v. Read*, 8 B. & C. 669.

(*m*) *Powles v. Hargreaves*, 3 De G., M. & G. 430.

(*n*) *Waring, Exp.*, 19 Ves. 345; *Carrick, Exp.*, 2 De G. & J. 208; *Bank of Ireland v. Perry*, L. R., 7 Ex. 14; *The City Bank v. Luckie*, L. R., 5 Ch. 773; *Banner v. Johnston*, L. R., E. & I. App. 157; *Vaughan v. Halliday*,

Such an appropriation overrides the general lien of the depositor upon the property deposited: it has, however, been doubted whether a specific appropriation can be made when the general lien has once attached (*o*), and it is submitted that for the purpose of raising an equity in favour of the bill holder it cannot, as he has not paid his money on the credit of such an appropriation. Where there is a direct contract with the bill holder for the application of the property he of course claims independently of such an equity (*p*).

The drawer of bills, who has made such a deposit for the indemnity of the acceptors, cannot intercept this equity of the bill holders by setting up a lien on the deposited property in respect of a loss to him, occasioned by the improper dealings of the acceptors with other property deposited for the purpose of meeting their acceptances on his account (*q*).

324. By the general law merchant, a banker or broker is also entitled (*r*) to a lien upon bills and papers deposited with him by his customers, and which are not known to the depositors to be the property of a third person, for the general balance due from the customer, unless there be evidence that the deposit was made under special circumstances (*s*), or for

L. R., 9 Ch. 561. For circumstances under which this equity is applicable see *ibid.* and General Rolling Stock Co., Re, L. R., 4 Ch. 423; *Levi's case*, id. 7 Eq. 449; *Trimingham v. Maud*, id. 201; *Smart, Exp.*, L. R., 8 Ch. 220; *Loder's case*, id. 6 Eq. 491; *Ackroyd, Exp.*, 3 De G., F. & J. 726; *Dewhurst, Exp.*, L. R., 8 Ch. 965; *Bank of Ireland v. Perry*, L. R., 7 Ex. 14.

(*o*) *Inman v. Clare*, Joh. 769, 5 Jur., N. S. 89, per Lord Hatherley; in which it was proved to be the custom of the cotton trade at Liverpool, that if a merchant put cotton into a broker's hands for sale, and the broker accept a bill on account of it, which is negotiated, the proceeds of the cotton must be applied by the broker to meet the acceptances.

(*p*) See *Copeland, Exp.*, 3 D. & C.

199; 2 M. & A. 177; *Brown, Exp.*, 2 Jur. 82; 3 M. & A. 471.

(*q*) *Carriek, Exp.*, 2 De G. & J. 208.

(*r*) *Davis v. Bowsher*, 5 T. R. 488; *Bolland v. Bygrave*, Ryan & M. 271; *Brandao v. Barnett*, 12 Cl. & Fin. 787; *Jones v. Peppercorne*, Joh. 430; 28 L. J., Ch. 158; *Wylde v. Radford*, 33 L. J., N. S., Ch. 51; 9 Jur., N. S. 1169. The observations of Kindersley, V.-C., in this case, have been taken to imply that the deposit of a conveyance of land is not a security which would be subject to the customary lien; but it may be doubted whether it was intended to make a distinction, the limits of which it would be so difficult to define, and without even suggesting the principle of it.

(*s*) See *European Bank, Re*, L. R., 8 Ch. 41.

special purposes, which would take it out of the general rule (255); and the banker's assignees in bankruptcy, by virtue of the lien, may sue the drawer of securities so deposited which are payable to bearer (*t*).

The lien will hold though the balance of the account to the credit of which the security was placed be in favour of the customer, if another account between him and the banker be deficient (*u*); and the application by the bankers of the money advanced to the discount of particular bills, does not affect the lien for their general balance upon other securities remaining in their hands (*x*).

But a banker has no lien which enables him to set off a debt due on the customer's private account against a balance standing to his credit on a trust account (*y*).

(*t*) *Scott v. Franklin*, 15 East, 428.

(*x*) *Davis v. Bowsher*, *supra*.

(*u*) *Jourdaine v. Lefevre*, 1 Esp. 66.

(*y*) *Kingston, Exp.*, L. R., 6 Ch. 632.

CHAPTER III.

OF SECURITIES WHICH ARE VOID OR IMPERFECT, OR WHICH ARE MADE UNDER STATUTORY OR OTHER POWERS.

PART 1.—OF VOID AND IMPERFECT SECURITIES.

PART 2.—OF SECURITIES MADE UNDER STATUTORY OR OTHER POWERS.

PART 1.

325. *Of Securities which are affected by the Character or Relation of the Parties, and herein—*

326. *Of such as are fraudulent under the Statutes of Elizabeth or the Bankrupt Acts.*

349. *Of such as are obtained by Misrepresentation, Extortion or undue Influence.*

359. *Of Securities which are affected by the Nature of the Consideration : and herein of immoral Securities.*

372. *Of Securities which are affected by the Nature of the Security ; and herein of Securities upon the Profits of Public Offices, and upon Property forbidden to be incumbered.*

325. A SECURITY may be void or imperfect by reason—

1. Of the character or mutual relation of the persons who are parties to or affected by the contract.
2. Of the nature of the consideration.
3. Of the subject of the security.

A security which is not by nature invalid in se, but is only prohibited, is not necessarily void for all purposes, but so far only as it is expressly forbidden. So that although a deed which attempts to create a charge upon an ecclesiastical benefice (a), (376) or upon military pay (b), or an unregistered bill of

(a) *Mouys v. Leake*, 8 T. R. 411; *Sloane v. Packman*, 11 M. & W. 770.
Gibbons v. Hooper, 2 B. & Ad. 734; (b) *Price v. Lovett*, 15 Jur. 786.

sale of a ship (*b*) (69), or a mortgage by a municipal corporation (*c*) to secure money raised for an unauthorized purpose, or made without the consent of the lords of the treasury, be by statute or otherwise declared to be void; such an instrument may operate in a manner which is not forbidden, viz., by way of personal security for the money which it was attempted to secure by mortgage, or as a security upon something which would lawfully pass by the mortgage: as in the case of an unregistered bill of sale of a ship—by way of assignment of the freight (*d*) (77); and a collateral bond or warrant of attorney, though it purport to be given as a further security for the same debt and recites the principal security, will be good in respect of the personal or other remedies which it gives (*e*). On the other hand, if several securities be given for the performance of a continuing obligation and one of them be set aside, the whole consideration fails and the purchase-money may be recovered from the grantor (*f*).

Of Fraudulent Securities.

326. By the statute 13 Eliz. c. 5, s. 2, every feoffment and conveyance of lands, tenements, hereditaments, goods and chattels, or of any lease, rent, common or other profit or charge thereon, by writing or otherwise, and every bond, suit, judgment and execution had or made for any intent or purpose to delay, hinder or defraud *creditors* and others of their just debts, rights and remedies, are declared only as against the persons or their representatives whose remedies are disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect; and accordingly both at law (*g*) and in equity (*h*), so far as regards the rights of the creditors, the matter is treated as if the fraudulent conveyance had never existed.

The act, however, does not extend to any estate or interest

(*b*) *Kerrison v. Cole*, 8 East, 231.

(*c*) *Payne v. Mayor of Brecon*, 3 H. & N. 572. See 5 & 6 Will. 4, c. 76; and see *Pallister v. Mayor of Gravesend*, 9 C. B. 774.

(*d*) See *Jones, Exp.*, 2 Cr. & J. 513.

(*e*) *Wynne v. Robinson*, 4 Bl., N. R.

27, 881.

(*f*) *Scurfield v. Gowland*, 6 East, 241; *Huggins v. Coates*, 5 Q. B. 432.

(*g*) See per Lord Tenterden, *Shears v. Rogers*, 3 B. & Ad. 362, 369.

(*h*) Per *Kindersley, V.-C.*, *Hue v. French*, 26 L. J., Ch. 317.

conveyed or assured upon good consideration and bonâ fide to any person or persons not having at the time of the conveyance notice of the fraud or collusion (*i*). An assignee who stands in that position will therefore have priority over the creditors of the maker of the fraudulent assignment (*k*).

327. By the statute 27 Eliz. c. 4, s. 2, made perpetual by 39 Eliz. c. 18, ss. 19, 31, 32, every conveyance, grant, charge, lease, estate, incumbrance and limitation of use, of, in or out of any lands, tenements or other hereditaments, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall afterwards purchase in fee simple, fee tail, for life, lives or years, the same lands, tenements and hereditaments or any part thereof, or any rent, profit or commodity in or out of the same or any part thereof, are declared void as against *purchasers* for money or good consideration, and persons claiming under them (**342, 1092**), saving, however (*l*), all estates in and assurances of lands made for good consideration, and bonâ fide. And (*m*) every conveyance or assurance of lands with a clause of revocation is declared to be void as against a subsequent assurance of the same hereditaments or any part thereof made without exercise of the power of revocation for money or other good consideration. Provided that no lawful mortgage made bonâ fide without fraud, upon good consideration, shall be impeached by force of the act (*n*).

328. Under the Bankruptcy Act, 1869, a debtor—

- (1) Who in England or elsewhere has made a conveyance or assignment of his property (which includes his property of any description, real or personal, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent arising out of or

(*i*) Sect. 6.

(*k*) *Morewood v. South Yorkshire Rail. Co.*, 3 H. & N. 798.

(*l*) Sect. 4.

(*m*) Sect. 5.

(*n*) Sect. 6.

incident to property) to a trustee or trustees, for the benefit of his creditors generally; or

- (2) Who has in England or elsewhere made a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof; or,
- (3) Who, with intent to defeat or delay his creditors, has done any of the other acts mentioned in the statute, commits thereby an act of bankruptcy upon which a petition that he may be adjudged a bankrupt may be founded. But the act of bankruptcy must have occurred within six months before the presentation of the petition for adjudication (o).

329. Any settlement of property made by a trader, and not being made before or in consideration of marriage, or in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or made on or for the settlor's wife or children, of property which has accrued to him after marriage in right of his wife, shall be void against the trustee in bankruptcy, if the settlor becomes bankrupt within two years after the date of the settlement, and if he becomes bankrupt at any subsequent time within ten years after its date, unless the parties claiming under it can prove that the settlor when it was made was able to pay all his debts without the aid of the settled property.

And any covenant or contract made by a trader, in consideration of marriage, for the future settlement (which includes any conveyance or transfer of property) upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or

(o) 32 & 33 Vict. c. 71, Bankruptcy Act, 1869, ss. 4, 6 (Irish Act, 35 & 36 Vict. c. 58, s. 21). The omission in sub-sect. 2 of sect. 6 of the English Act of 1869, of the words "with intent to defeat or delay his creditors," which were present in the previous acts, was not intended to alter the already existing law, but because the words were thought to be superfluous. (Wood, Re,

L. R., 7 Ch. 302, per Mellish, L. J.) A sale by a debtor who is insolvent to the execution creditor, of the goods taken in execution, for the amount of the debt and the sheriff's charges, the property being left in the debtor's custody for his use in consideration of a certain payment, is fraudulent under sect. 6 (2). (Pearson, Exp., L. R., 8 Ch. 667.)

contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been transferred or paid, pursuant to the contract or covenant, be void against the trustee in the bankruptcy (*p*).

The latter part of this provision, (which applies to settlements executed before as well as after the act came into operation (*q*),) is aimed at the settlement of property which may hereafter accrue to the covenantor, but in which he has no present interest, and does not affect a covenant to pay a sum of money to the trustees of a marriage settlement at a future time (*r*).

330. By another provision, the application of which (as it has been intimated) requires that the transaction in question must have been a fraudulent preference under the already existing law, and which, therefore, does not alter the rule as to the nature of the pressure which is sufficient to support a security in favour of a particular creditor (*s*) (**337**), every conveyance, transfer of property or charge thereon, and every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies, in favour of any creditor or person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if such person shall become bankrupt within three months thereafter, be fraudulent and void against the trustee of the bankrupt; saving, however, the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration (*t*); a saving which applies to the creditor himself, who receives his debt from the insolvent without knowledge of the insolvency, as well as to a person who claims through him (*u*), and, perhaps, also to purchasers in good faith and for valuable consideration from creditors who do not themselves fall within the terms of the saving clause (*x*).

(*p*) 32 & 33 Vict. c. 71, s. 91 (Bankruptcy Act, 1869); 35 & 36 Vict. c. 58, s. 52 (Bankruptcy Ireland Amendment Act, 1872).

(*q*) Dawson, Exp., L. R., 19 Eq. 433.

(*r*) Bishop, Exp., L. R., 8 Ch. 718.

(*s*) Tempest, Exp., L. R., 6 Ch. 70.

(*t*) Bankruptcy Act, 1869, c. 71, s. 92; Irish Bankruptcy Act, 1872, c. 58, s. 52.

(*u*) Butcher, Exp., L. R., 9 Ch. 595.

(*x*) Id., per Mellish, L. J. 601.

331. The provisions of both these sections apply equally to cases of liquidation by arrangement (*y*); and the transaction is equally voidable under the bankruptcy laws, whether the goods have been retained by the transferee under the fraudulent assignment, or have been sold, and although the adjudication was obtained on the petition of the bankrupt himself (*z*); and the act does not invalidate any payment made in good faith and for value received to any bankrupt, or any payment or delivery of money or goods belonging to a bankrupt, or any contract or dealing with any bankrupt, made in good faith and for valuable consideration, provided that such payments, deliveries and contracts or dealings are made by persons who had not at the date thereof notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication (*a*).

And it declares to be valid, notwithstanding any prior act of bankruptcy, any disposition or contract with respect to the disposition of property, by conveyance, transfer, charge, delivery of goods, payment of money or otherwise, made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of such disposition notice of any act of bankruptcy committed by and available against the bankrupt for adjudication; and any execution or attachment against the land of the bankrupt executed by seizure, or against his goods executed by seizure and sale, if such seizure and seizure and sale respectively be executed in good faith before the order of adjudication, and the person on whose account the same was executed had not, at the time of execution, notice of any act of bankruptcy committed by and available for adjudication against the bankrupt (*b*). The act of bankruptcy referred to is an act committed before the seizure (*c*).

332. It is a misdemeanor punishable with imprisonment for any time not exceeding two years, with or without hard labour,

(*y*) Bankruptcy Act, 1869, c. 71, s. 125 (5).

(*z*) Marks v. Felman, L. R., 5 Q. B. 275.

(*a*) Bankruptcy Act, 1869, s. 94.

(*b*) Id. s. 95 (1), (2), (3); see the Irish Act, *supra*, s. 55. See Hoare, Exp.,

L. R., 16 Eq. 625.

(*c*) Todhunter, Exp., L. R., 10 Eq. 425, following construction of s. 133 of act of 1849. See Edwards v. Scarsbrook, 3 B. & S. 290; 9 Jur., N. S. 537; 10 id. 201; Young v. Roebuck, 2 H. & C. 296.

if a trader adjudged bankrupt, or whose affairs are liquidated by arrangement under the Bankruptcy Act, 1869, within four months next after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, pawns, pledges or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud (*d*). And it is a misdemeanor in any person, punishable with imprisonment for any term not exceeding one year, with or without hard labour, if he has, with intent to defraud his creditors or any of them, made or caused to be made any gift, delivery or transfer of, or any charge on, his property (*e*).

333. The statute 13 Elizabeth did not of its own force apply to copyholds, unless by tenure or special custom they were subject to debts (*f*); nor to choses in action, because they could not be taken in execution during the life of the debtor. But such choses in action as by virtue of 1 & 2 Vict. c. 110, s. 12, may be taken in execution, now fall within the statute 13 Elizabeth (*g*); and even before the passing of 1 & 2 Vict., after the death of the debtor, when the creditors might reach all the personal property, and during his life, when, by reason of his insolvency, all his property became subject to the payment of his debts, the statute applied (*h*). So it appears to be in bankruptcy as to property which cannot be taken in execution under 1 & 2 Vict. c. 110, and in like manner it seems that copyholds, which are now subject to execution, have been brought within the statute (*i*). Nor can a debtor affect the creditor's right by settling the proceeds of the assignment upon his wife and family, this being an application of the money to his own purposes and a fraud against the creditors (*k*).

(*d*) The Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 11 (15). See Brett, Exp., L. R., 1 Ch. Div. 151.

(*e*) Id. s. 12 (2).

(*f*) Mathews v. Feaver, 1 Cox, 278.

(*g*) Barrack v. McCulloch, 3 K. & J. 110. And see French v. French, 6 De

G., M. & G. 95; and Sims v. Thomas, 12 A. & E. 554, per Lord Denman.

(*h*) Norcutt v. Dodd, Cr. & Ph. 100.

(*i*) See Smith's Leading Cases, vol. i. p. 23, ed. 6.

(*k*) French v. French, 6 De G., M. & G. 95; Hue v. French, 26 L. J., Ch. 317; Neale v. Day, 28 id. 45.

To enable a living creditor to sue under the statute for the purpose of setting aside a deed, it is not necessary that he should first obtain a charging order or other lien upon the property, although, without taking the necessary proceedings to obtain such a lien, he cannot have relief against the property (*l*).

334. It has been held at law (*m*), that an assignment of the debtor's goods is not void against a person who only became a creditor after the date of the assignment. In equity, on the other hand (*n*), the statute has been applied to the defeating of prospective as well as of existing debts, on the ground that the transaction is fraudulent if done with a view to future indebtedness; and the statute has, therefore, been held to avoid a conveyance of the grantor's property made shortly before the trial of an action in which he was defendant, and the object of which was inferred to be the defeat of an anticipated judgment debt, or a provision against the risk of an intended hazardous trade. But the rule has been modified where the assignment was made under ordinary circumstances before the debt accrued; on the consideration that there can be no fraudulent intent to support a suit by a subsequent creditor, unless a debt due at the date of the assignment be still subsisting (*o*); although as a person delayed by the voluntary gift, he is entitled to participate in the assigned property when the assignment has been set aside (*p*).

335. To support a deed under any of the above statutes, there must be a sufficient valuable consideration. As against creditors the deed will not be supported, where part of the

(*l*) *Goldsmith v. Russell*, 5 De G., M. & G. 547; *Reese River, &c. Co. v. Atwell*, L. R., 7 Eq. 347.

(*m*) *Oswald v. Thompson*, 2 Exch. 215. But see *Graham v. Furber*, 14 C. B. 410, per Williams, J.

(*n*) *Stileman v. Ashdown*, 2 Atk. 481; *Tarback v. Marbury*, 2 Vern. 510; *Barling v. Bishopp*, 29 Beav. 417; *Mackay v. Douglas*, L. R., 14 Eq. 106;

Freeman v. Pope, 5 Ch. 538. See per Wood, V.-C., *Holmes v. Penney*, 3 K. & J. 100.

(*o*) *Jenkyn v. Vaughan*, 3 Dr. 419. See *Spirett v. Willows*, 11 Jur., N. S. 70; 5 Gif. 49; 3 De G., J. & S. 302. But see *Freeman v. Pope*, *supra*.

(*p*) *Barton v. Van Heythuysen*, 11 Hare, 126.

consideration is natural love and affection (*q*); though a consideration of that kind will be taken into account against purchasers (*r*). The consideration, however, need not be pecuniary. Subject to the law of bankruptcy, which forbids a trader to withdraw his future property from his creditors (329), marriage will sustain a deed either under the statutes of Elizabeth or the bankrupt law (*s*); and under the 27th Elizabeth, a promise by an infant on marriage to settle an estate, when he should come of age, upon himself and his issue, has been held (*t*) to be sufficient consideration, though the infant could not be compelled to perform the promise. But to the extent to which a settlement is not obligatory (*u*), or for marriage or other valuable consideration, it will fail; and the consideration of marriage will be no protection where the circumstances show that the marriage was part of a scheme for defrauding the creditors of the husband (*x*). Nor will a verbal promise before marriage to execute a settlement add anything to the validity of a settlement made after the marriage (*y*). Assignments by means of which the debtor's property is released from distress or execution, and arrangements made with creditors, have also been supported (*z*).

336. The bona fides of a transaction is the principal test of its validity under the statute of 13 Elizabeth. If this quality be wanting, it has been said (*a*) that even the payment of a full valuable consideration, with change of possession, will not make it good. A fraudulent intention on the part of the assignor may be inferred from various circumstances. His indebtedness at the time of the transaction is an important consideration, though not absolutely decisive of the validity of

(*q*) *Mathews v. Feaver*, 1 Cox. 278.

(*r*) *Perse v. Perse*, 7 Cl. & F. 279.

(*s*) *Campion v. Cotton*, 17 Ves. 263; *Fraser v. Thompson*, 1 Gif. 49; 5 Jur., N. S. 669; *M'Burnie, Exp.*, 1 De G., M. & G. 441; *Mayor, Exp.*, Mont. 292.

(*t*) *Lavender v. Blakstone*, 2 Lev. 146.

(*u*) *Goldsmith v. Russell*, 5 De G.,

M. & G. 547; *Smith v. Cherrill*, L. R., 4 Eq. 390.

(*x*) *Colombine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, L. R., 8 Eq. 46.

(*y*) *Crossley v. Elworthy*, L. R., 12 Eq. 158.

(*z*) *Arnell v. Beau*, 8 Bing. 87; *Knight v. Fergusson*, 5 M. & W. 389.

(*a*) Per Lord Mansfield, *Cowp.* 432.

a voluntary conveyance; for there may be fraud without insolvency, and the deed may be good though the grantor be indebted. As a general rule the transaction will be void, if it appear that there was an intention to defeat or delay the creditors, though no actual delay be caused; or if the debtor knew that delay would be the consequence of the transaction (*b*), and the intention will be inferred where the settlement is voluntary, and the plaintiff was a creditor at its date, if the effect of it was to take from the settlor's property an amount without which his debts cannot be paid (*c*). And the insolvency shortly after the date of the conveyance will throw upon those who uphold it the burden of showing that the grantor was in a position to make it (*d*). But when the settlement is for valuable consideration, evidence must be given of circumstances which show an intent to defeat or delay creditors (*e*).

337. An assignment is not fraudulent or void against the bankruptcy laws because it has the effect of delaying a particular creditor, if it be made *bonâ fide* on the demand of a creditor, and for good consideration (*f*), and not for the mere purpose of defeating creditors (*g*). The debtor or his personal representative may therefore, at any time before execution executed by a judgment creditor, either secure a more favoured creditor, or provide rateably for all his creditors (*h*); and to support such a transaction, and to rebut the presumption of

(*b*) *Richardson v. Smallwood*, Jac. 552; *Townsend v. Westacott*, 2 Beav. 340; *Thompson v. Webster*, 5 Jur., N. S. 668, 921; 7 id. 531; 4 De G. & J. 600. See *Shears v. Rogers*, 3 B. & Ad. 362; *French v. French*, 6 De G., M. & G. 95; *Holmes v. Penney*, 3 K. & J. 90; *Aldred v. Constable*, 4 Q. B. 674; *Mayon, Exp.*, 11 Jur. N. S. 438. See *Kent v. Riley*, 14 Eq. 190.

(*c*) *Freeman v. Pope*, L. R., 5 Ch. 538, per Lord Hatherley; *Jenkyn v. Vaughan*, 4 Dr. 419, per Kindersley, V.-C.

(*d*) *Crossley v. Elworthy*, L. R., 12 Eq. 158; *Mackay v. Douglas*, 14 id. 106.

(*e*) Per Lord Hatherley, *Freeman v. Pope*, L. R., 5 Ch. 538.

(*f*) *Darvill v. Terry*, 6 H. & N. 807; *Wood v. Dixie*, 7 Q. B. 892; *Hale v. Metropolitan Saloon Omnibus Co.*, 28 L. J., Ch. 777; 4 Dr. 492.

(*g*) *Bott v. Smith*, 21 Beav. 511.

(*h*) *Holbird v. Anderson*, 5 T. R. 235; *Meux v. Howell*, 4 East, 1; *Pickstock v. Lyster*, 3 M. & S. 371; *Wolverhampton and Staffordshire Banking Co. v. Marston*, 7 H. & N. 148; see *Evans v. Jones*, 3 H. & C. 423; 11 Jur., N. S. 784; *Westbury v. Clapp*, 12 W. R. 511; *Gladstone v. Padwick*, L. R., 6 Ex. 203, per Martin & Bramwell, BB.

fraud arising from an apparent want of consideration, evidence of the real circumstances and of the existence of a valuable consideration may be given, provided it do not contradict the allegations of the deed (*i*). The subsequent execution of a security for money advanced on the faith of an absolute (but not of a conditional) promise to give a bill of sale (*k*), or in pursuance of an agreement under which the consideration money has been previously advanced will also be good, if the original transaction be valid (*l*), but not if it be of a fraudulent character, with intent to defeat the other creditors (*m*).

It was formerly considered that, to make valid under the bankrupt and insolvent acts a security by which a particular creditor was preferred, it must have been given under ● pressure by the latter, amounting to coercion (*n*). The question, which is still the same as before the Act of 1869 (*o*), is however, now understood to be, whether the preference were the mere voluntary act of the debtor, or *bonâ fide* required or originating in a demand by the creditor (*p*). To be fraudulent it must be both voluntary and made under circumstances which lead to an inference that it was in contemplation of bankruptcy (*q*). And if the transaction be otherwise *bonâ fide* (*r*), it is not impeachable because the property was delivered by the debtor secretly to save his credit before the world (*s*); or that it was given in pursuance of a former promise by the debtor upon which the creditor had relied (*t*) (**33.**)

The circumstance that the creditor is the solicitor of the

(*i*) *Gale v. Williamson*, 8 M. & W. 405.

(*k*) *Fisher, Re*, L. R., 7 Ch. 636.

(*l*) *Hutton v. Crettwell*, 1 El. & Bl. 15; *Harris v. Rickett*, 4 H. & N. 1; *Izard, Exp.*, L. R., 9 Ch. 271.

(*m*) *Cohen, Exp.*, L. R., 7 Ch. 20.

(*n*) *Per Lord Chelmsford, C.*, 3 De G. & J. 24. See *Cook v. Rogers*, 7 Bing. 438; *Davies v. Acocks*, 2 C. M. & R. 461.

(*o*) *Topham, Exp.*, L. R., 8 Ch. 614.

(*p*) *Van Casteel v. Booker*, 2 Ex.

691; 18 L. J., N. S., Exch. 13; *Mogg v. Baker*, 4 M. & W. 348; *Johnson v. Fesomeyer*, 3 De G. & J. 13; 25 Beav. 88. See *Hale v. Allnutt*, 18 C. B. 505; *Tempest, Exp.*, L. R. 6 Ch. 70; *Blackburn, Exp.*, 12 Eq. 358; *Topham, Exp.*, 8 Ch. 614.

(*q*) *Brown v. Kempton*, 19 L. J., C. P. 169; *Shrubsole v. Sussams*, 16 C. B., N. S. 459, per Willes, J.

(*r*) See *Reader, Exp.*, 20 Eq. 783.

(*s*) *Crosby v. Crouch*, 11 East, 256.

(*t*) *Hodgkin, Exp.*, 20 Eq. 746.

debtor does not (*u*) affect the question of fraudulent preference, except so far as it gives facilities for disguising a voluntary transaction under an appearance of demand and submission.

338. A deed is not fraudulent under 13 Eliz. because it is an assignment of the whole of the grantor's property (*v*). But an assignment by the debtor of the whole, or of the whole with a colourable exception, of his property is an act of bankruptcy and void because it delays his creditors (*x*); which is also the effect of an assignment by a trader of so much of his property, that he is, or by the enforcing of the mortgagee's remedies would be, prevented from carrying on his business, through a practical insolvency, or the loss of the necessary appliances (*y*). But if there be a real and substantial exception, of property which would pass to the trustee in bankruptcy (*z*), and no fraud or intention to contravene the bankrupt law, the assignment will be good (*a*). And as the defeat of the creditors by means of the insolvency, and not the mere stoppage of the business, is the foundation of the act of bankruptcy, a security upon all the debtor's property, so that it be in consideration of a proper advance or equivalent, or of a parol or other agreement for a further credit which is afterwards given, may be good, as a transaction most beneficial to the creditors by enabling the debtor to carry on his business (*b*); a substantial advance of money being considered to place the matter on the same footing, as the exception from the assignment of a substantial part of

(*u*) *Johnson v. Fesemeyer*, 3 De G. & J. 13; 25 Beav. 88.

(*v*) *Alton v. Harrison*, L. R., 4 Ch. 622.

(*x*) *Lindon v. Sharp*, 6 Man. & G. 895; 7 Sc., N. R. 730; *Stewart v. Moody*, 1 C., M. & R. 777; *Dutton v. Morrison*, 17 Ves. 193; *Smith, Exp.*, 1 Ves. & B. 518; *Bailey, Exp.*, 3 De G., M. & G. 534; *Bland, Exp.*, 6 id. 757; *Smith v. Cannan*, 2 El. & Bl. 35.

(*y*) *Stanger v. Wilkins*, 19 Beav. 626; *Goodricke v. Taylor*, 2 H. & M. 380; 2 De G., J. & S. 135; 10 Jur., N. S. 414; see *Pennell v. Dawson*, 18 C. B. 355; *Lewis, Exp.*, 31 L. J., N. S. Bankruptcy 11; *Sparrow, Exp.*, 2 De G., M.

& G. 907; *Carr v. Burdiss*, 1 C. M. & R. 443; *Siebert v. Spooner*, 1 M. & W. 718, per Parke, B.

(*z*) *Hawker, Exp.*, L. R., 7 Ch. 214.

(*a*) *Pennell v. Reynolds*, 11 C. B., N. S. 709; *Smith v. Timms*, 1 H. & C. 849; and see *Hale v. Allnutt*, 18 C. B. 505; *Bell v. Simpson*, 2 H. & N. 410.

(*b*) *Young v. Wand*, 8 Exch. 221; *Baxter v. Pritchard*, 1 A. & E. 456; *Rose v. Haycock*, id. 460, n.; *Hutton v. Cruttwell*, 1 El. & Bl. 15; *Bittlestone v. Cooke*, 6 id. 296; *Mercer v. Peterson*, L. R., 2 Ex. 904, 3 id. 104; *Lomax v. Buxton*, L. R., 6 C. P. 107; *Winder, Exp.*, L. R., 1 Ch. Div. 290.

the debtor's property (*c*); and the small proportion of the advance to the value of the property pledged being considered in determining the object and bona fides of the pledge, but not being taken as conclusive evidence of fraud (*d*).

The question what is an equivalent must be considered with reference to the provision of the Bankruptcy Act, 1869 (*e*), that the proceeds of a sale under an execution against a debtor, on a judgment for a sum exceeding 50*l.*, is to be paid to the trustee under the bankruptcy if notice of the presentation of a bankruptcy petition be served on the sheriff or officer of the county court under the direction of which the sale was made, within fourteen days, and the trader is adjudged a bankrupt on such petition, or on some other petition of which the sheriff or officer has notice; because, it being assumed that the creditors will take the opportunity given them by the act of obtaining possession of the proceeds, they would be damnified by an assignment of the debtor's property to the execution creditor in lieu of a sale (*f*).

A power may be given to the assignee to carry on the trade of the debtor, provided it be subsidiary to the winding-up of his affairs, and was not given for the purpose of obtaining future profits (*g*). It seems that if the power were given with such an intention the deed will be avoided; which will also be the consequence if the exercise of the power would create a partnership between the persons who are to carry out the provisions of the deed (*h*).

339. It has been held that an assignment of the whole of the debtor's property will be an act of bankruptcy, if part of the consideration was an existing debt, because it is in effect an

(*c*) Per Willes, J., *Pennell v. Reynolds*, 11 C. B., N. S. 709; *Shrubsole v. Sussams*, 16 C. B., N. S. 452; *Lomax v. Buxton*, L. R., 6 C. P. 107; *Allen v. Bonnett*, 5 Ch. 577; see *Reed, Exp.*, 14 Eq. 586.

(*d*) Per Erle, J., *Graham v. Chapman*, 12 C. B. 85; *Fisher, Exp.*, L. R., 7 Ch. 636.

(*e*) 32 & 33 Vict. c. 71, s. 87.

(*f*) *Woodhouse v. Murray*, L. R., 2 Q. B. 634; 4 id. 27; on the corresponding provision in the Bankruptcy Act, 1861, s. 73; and see *Foxley, Exp.*, id., 3 Ch. 515.

(*g*) *Janes v. Whitbread*, 11 C. B. 406; *Coates v. Williams*, 7 Exch. 205.

(*h*) *Owen v. Body*, 5 A. & E. 28; and see *Hickman v. Cox*, 8 H. L. C. 268; 9 C. B., N. S. 4.

assignment of the whole for the price of part (*i*): except where the advance is for the benefit of the estate by relieving it from a charge already existing (*h*). But in several cases it has been laid down that an assignment in consideration of an existing debt is not necessarily an act of bankruptcy. The question appears to be whether fraud was intended or under the circumstances must be inferred (*l*). The discharge of an existing security may be fraudulent if, having been made in contemplation of bankruptcy, it would prevent an equal distribution of the property under the bankruptcy, although the creditor discharged, receiving only the money in place of a good security, derived no benefit from the payment; as where the mortgage was on the property of the bankrupt's wife, and the discharge of it was only for the advantage of her and the bankrupt (*m*).

340. Evidence ^q may be given of the effect of the deed (*n*) where it does not in terms assign all the property of the debtor; and though all of it be assigned, the assignment may be good if the lender did not actually know, and had not, from the nature of the transaction, notice that the object was to defeat and delay the creditors of the assignor (*o*).

341. Under the statute 27 Eliz. c. 4 (which includes copyholds (*p*), but not personal estate (*q*)), a conveyance which is made only for good, and not for valuable consideration, is voluntary (*r*), and, because voluntary, fraudulent and capable of

(*i*) *Graham v. Chapman*, 12 C. B. 85. In this case the transfer also gave the transferee a right to seize the future acquired property of the transferor; *Lacon v. Liffen*, 33 L. J., Ch. 25, 315; 4 Gif. 75; Aff., 9 Jur., N. S. 477; *Hawker, Exp.*, L. R., 7 Ch. 214; *Wood, Re*, id. 302.

(*h*) *Whitmore v. Claridge*, 31 L. J., Q. B. 141; 33 id. 87.

(*l*) *Bell v. Simpson*, 2 H. & N. 410; *Pennell v. Reynolds*, 11 C. B., N. S. 709; *Shrubsole v. Sussama*, 16 id. 452, 458. And see observations of Willes, J., in *Lomax v. Buxton*, L. R., 6 C. P.

118.

(*m*) *Marshall v. Lamb*, 5 Q. B. 115,^g 13 L. J., N. S., Q. B. 75.

(*n*) *Lindon v. Sharp*, 6 Man. & G. 895; 7 Sc., N. R. 730.

(*o*) Per Willes, J., *Pennell v. Reynolds*, 11 C. B., N. S. 709; In re *Colemere*, L. R., 1 Ch. 128.

(*p*) *Doe d. Tunstill v. Bottrill*, 5 B. & Ad. 131; *Currie v. Nind*, 1 M. & C. 17.

(*q*) *Bill v. Cureton*, 2 M. & K. 508.

(*r*) *Goodright d. Humphreys v. Moses*, 2 W. Bl. 1019; *Barton v. Van Heythysen*, 11 Hare, 126.

being set aside against a mortgagee or other subsequent purchaser for valuable consideration, even though he had notice of the voluntary conveyance (*s*). But a subsequent judgment creditor of the settlor is not a purchaser within the act (*t*). And (except, it seems, where the conveyance is fraudulent in fact or fraudulently kept on foot (*u*)) it cannot be set aside in favour of a purchaser from the heir or devisee of the grantor (*x*); nor of a purchaser from his subsequent voluntary grantee: because (except as to a purchaser for value) the grantor has exhausted his estate by the first voluntary conveyance (*y*). And if a mortgage be made secretly, to defeat other claimants (*z*), or a settlor reserve an unlimited power to mortgage (*a*), or to make leases for any term, with or without rent (*b*), or if he continue in possession and sell part of the property of his own authority, or if he sell under a power and receive the purchase-money, though the settlement direct that it shall be applied to the like uses as the settled estate (*c*); in any of these cases the assurance is considered to be fraudulent.

The purchaser under the first deed may, however, show by sufficient evidence of the inadequacy of the consideration, that the second deed was only colourable (*d*); and the instrument will be good as against the grantor himself (*e*); and inasmuch as a thing done fraudulently in its creation and voidable by a purchaser, may be made good by matter *ex post facto*, the voluntary instrument will be good against the general creditors,

(*s*) *Doe d. Ottley v. Manning*, 9 East, 59; *Chapman v. Emery*, Cowp. 278; *Doe d. Parry v. James*, 16 East, 212.

(*t*) *Beavan v. Lord Oxford*, 2 Jur., N. S. 121; 6 De G., M. & G. 507; *Dolphin v. Aylward*, L. R., 4 E. & I. App. 486; but see *Garth v. Ersfield*, Bridg. 22; *Girling v. Lowther*, 2 Ch. R. 136.

(*u*) *Burrell's case*, 6 Rep. 72; Sugd. V. & P. 11th ed. 928; 14th ed. 713.

(*x*) *Doe d. Newman v. Rusham*, 17 Q. B. 723; 16 Jur. 359; *Lewis v. Rees*, 3 K. & J. 132; see *Parker v. Carter*, 4 Ha. 409.

(*y*) *Doe d. Newman v. Rusham*, supra.

(*z*) *Lloyd v. Attwood*, 3 De G. & J. 614; 5 Jur., N. S. 1323.

(*a*) *Tarback v. Marbury*, 2 Vern. 510.

(*b*) *Lavender v. Blakstone*, 2 Lev. 146.

(*c*) *Evelyn v. Templar*, 2 Bro. C. C. 148.

(*d*) *Doe d. Parry v. James*, 16 East, 212.

(*e*) *Smith v. Garland*, 2 Mer. 123; see *Peter v. Nicolls*, L. R., 11 Eq. 391.

and also against the subsequent assignees for value of the maker, where the voluntary grantee has assigned for marriage or other valuable consideration (*g*). And where a voluntary grant is complete, *bonâ fide*, and unaffected by the statutory disability, it vests in the claimant under it the same rights as a deed executed for value, including the right to take proceedings to set aside a prior conveyance which is voidable in equity (*h*).

342. It has been held at law, that an equitable mortgagee by deposit, having only a right to go to equity for a legal conveyance, is not a purchaser within the act of 27 Eliz. (*i*). But in equity it is considered (*h*) that the purchaser of an equitable estate ought to be no more affected by a voluntary conveyance than the purchaser of a legal estate; and, therefore (*l*), a mortgagee, by deposit of title deeds, with an undertaking to execute a legal mortgage (or, it is conceived, without such an undertaking), is a purchaser within the statute (**42, 953**).

And if there be fraud in a transaction to which an insolvent or bankrupt was party, his assignees, who represent the creditors, may take advantage of it (*m*).

A mortgage deed has been held to be well delivered where, after execution, it was given by the debtor to his own attorney, who, although he immediately gave notice of it to the prior mortgagees, did not deliver it to those in whose favour it was made until after the bankruptcy of the mortgagor (*n*).

343. The possession and reputed ownership by the debtor of chattels after an alleged absolute assignment by him, or after they have been taken in execution by the creditor, has

(*g*) *Prodgers v. Langham*, 1 Sid. 133; *George v. Milbanke*, 9 Ves. 190; *Payne v. Mortimer*, 1 Gif. 118; 4 De G. & J. 447; *Doe d. Newman v. Rusham*, *supra*; per Lord Campbell, *Clarke v. Willott*, L. R., 7 Ex. 318.

(*h*) *Dickinson v. Burrell*, L. R., 1

Eq. 337.

(*i*) *Kerrison v. Dorrien*, 9 Bing. 76.

(*k*) *Buckle v. Mitchell*, 18 Ves. 100.

(*l*) *Lister v. Turner*, 5 Hare, 281.

(*n*) *Doe d. Grimsby v. Ball*, 11 M. & W. 531.

(*n*) *Grugeon v. Gerrard*, 4 Y. & C. 119.

from an early period, been treated (*o*) as a fraud against creditors, because possession is the chief test of the ownership of chattels, and by means of it the debtor acquires a credit to which his real circumstances do not entitle him (22, 887). This inference of fraud also arises as to real estate, when the assignor retains the possession of the title deeds (*p*).

344. Possession by the assignor is not however considered to be fraudulent, where delivery to the assignee would be inconsistent with the terms or object of the transaction. If the security deed be made conditional, the grantor's continuance in possession will not avoid it, because the grantee is not to have possession till he has performed the condition (*q*); and if a mortgage deed be duly executed and not delivered as an escrow, the mere retainer of it without fraud by the grantor will not avoid it although it be made secretly (*r*). But if the security be absolute in form, with an agreement that the debtor shall remain in possession for a limited time, or that it shall be void on payment at a future day, it will be bad unless the grantee take possession as if there were no such provision (*s*).

345. Nor is it an objection to the validity of the deed that the debtor is allowed by the assignee to remain in the apparent possession of and to use the property where the ownership and actual possession of it is notorious (*t*); nor as between the contracting parties that the assignee lends the goods or lets them on hire to the debtor, if they were publicly purchased and a bill of sale was taken from the sheriff (*u*); nor that the

(*o*) *Twyne's case*, 3 Rep. 80; *West v. Skip*, 1 Ves. 245.

(*p*) *Doe d. Grimsby v. Ball*, 11 M. & W. 531; and see *Perry Herrick v. Attwood*, 2 De G. & J. 21.

(*q*) *Edwards v. Harben*, 2 T. R. 587; *Martindale v. Booth*, 3 B. & Ad. 498; *Meggott v. Mills*, 1 Raym. 286; and see *Cadogan v. Kennett*, Cowp. 432; *Reed v. Wilmot*, 7 Bing. 577; 5 Moo. & P. 553.

(*r*) *Exton v. Scott*, 6 Sim. 31.

(*s*) *Edwards v. Harben*, *supra*; — *v. Cramphorne*, 3 L. J., Ch. 223; 6 id. 91.

(*t*) *Latimer v. Batson*, 4 B. & C. 652; see *Leonard v. Baker*, 1 M. & S. 251.

(*u*) *Kidd v. Rawlinson*, 3 B. & P. 59; *Watkins v. Birch*, 4 Taunt. 822; see *Jezeph v. Ingram*, 8 id. 838; 1 Mo. 189; *Cook v. Walker*, 3 W. R. 357.

debtor retains the actual possession by agreement for a temporary purpose and as the servant of the assignee (*x*); though the latter cannot complete his title by making the assignor his agent *for the purpose* of taking and holding possession (*y*). The assignor may also retain the possession when the subject of the assignment is a chattel annexed to the land, and as such distinguishable from goods of which the property usually accompanies the possession (28); or when the assignee cannot conveniently obtain possession (*z*). Neither is the possession of the assignor fraudulent where he is tenant in common with the purchaser, because the possession of one tenant in common is the possession of all (*a*).

346. It is unnecessary that the assignment of the chattels should be followed by possession, in order to make it valid against the assignor himself, or against his creditors who are cognizant of and take part in the arrangement under which it is made, or which proceeded upon the assumption of its validity; or against strangers (*b*); though it seems that a stranger may afterwards become a creditor under such circumstances that he will have an equity to set aside the assignment (*c*). And a merely fictitious sale, without assignment, made to avoid an execution, and resting only upon a receipt for money and a delivery of the goods, will not pass the property in them, and may be avoided even by the debtor (*d*).

347. The assignment will also be good against the trustee in bankruptcy of the assignor, if the property be beyond sea, as in the case of ships in a foreign port, so long as by reason of absence immediate possession cannot be taken (*e*); the

(*x*) *Reeves v. Capper*, 5 Bing. N. C. 136.

(*y*) *Holroyd v. Marshall*, 10 H. L. C. 191.

(*z*) *Steward v. Lombe*, 1 Bro. & B. 508; 4 Mo. 281.

(*a*) *In re Mathews*, 1 Atk. 185.

(*b*) *Steel v. Brown*, 1 Taunt. 381;
Robinson v. McDonnell, 2 B. & Al. 134; *Bessey v. Windham*, 6 Q. B. 166;

White v. Morris, 11 C. B. 1015; *Olliver v. King*, 8 De G., M. & G. 110.

(*c*) See per Sir T. Plumer, *Richardson v. Smallwood*, Jac. 556; per Wood, V.-C., *Holmes v. Penney*, 3 K. & J. 100.

(*d*) *Bowes v. Foster*, 2 H. & N. 779.

(*e*) *Atkinson v. Maling*, 2 T. R. 462;
Brown v. Heathcote, 1 Atk. 185;
Batson, Exp., 3 Bro. C. C. 362.

delivery of the indicia of ownership being in the meantime sufficient. The same rule applies to an unfinished chattel, which having been appropriated as the property of the assignee by payment of part of the price or other equivalent, is left in the assignor's possession during a reasonable time for completion or repair (24). Such is an unfinished ship in the yard of the builder (*f*); and the right of the assignee will not be affected by a particular custom of the assignor to build ships for sale on his own account (*g*).

348. But except in such cases as these, the law will not allow the mortgagee to hold chattels or choses in action, of which the mortgagor has been left in possession, as against his trustee in bankruptcy; who, notwithstanding the assignment, is entitled to consider the property as within the order and disposition of the bankrupt as reputed owner, whether he acquired possession at the time of the mortgage or by a subsequent redemise (*h*).

Where the vendor of goods in whose hands the documents of title are left by the purchaser pledges them and becomes bankrupt, they are not in his possession within the act, because he cannot obtain them without paying the pledgee's debt (*i*).

Of Securities obtained by Misrepresentation, Extortion or undue Influence.

349. Another kind of imperfection in securities will arise where the security has been obtained from the mortgagor by threats or false representations; as in the case of a security for a debt for which the mortgagee untruly represented that he was liable as the mortgagor's surety, although the representation was made without an improper motive (*k*). Or where

(*f*) *Woods v. Russell*, 5 B. & Ald. 942; *Clarke v. Spence*, 4 Ad. & El. 448; *Holderness v. Rankin*, 28 Beav. 180; 2 De G., F. & J. 258; *Swainston v. Clay*, 4 Gif. 187.

(*g*) *Holderness v. Rankin*, *supra*.

(*h*) *Ryall v. Rowles*, 1 Ves. 348; 1 Atk. 165; *Lingham v. Biggs*, 1 B. & P.

82; *Bryson v. Wylie*, *id.* 83, note; *Freshney v. Carrick*, 1 H. & N. 653; *Hornsby v. Miller*, 5 Jur., N. S. 938; *Spackman v. Miller*, 12 C. B., N. S. 659; 9 Jur., N. S. 50.

(*i*) *Greening v. Clark*, 4 B. & C. 316.

(*k*) *Blomfield v. Blake*, 6 Car. & P.

the security contains extortionate provisions, from the effect of which the mortgagor may be relieved upon equitable terms, or where the mortgagee has either exacted unconscionable advantages, or has improperly clogged the right of redemption (1187).

In the exercise of this jurisdiction the Court formerly interfered with an oppressive kind of security called a Bristol bargain, by which the debt and interest were to be repaid by instalments, at the rate of 20*l.* per annum for seven years for every 100*l.* advanced, up to which point the security was allowed, the rate of interest being then 6*l.* per cent. But when it was attempted to increase the number of annual instalments to eight, it was declared that the agreement was against conscience, and that if allowed it might be carried on without stint or bounds; and redemption was decreed on the usual terms of paying principal and interest (1). And Sir John Power, M.R., said he thought the Court would relieve against an ordinary Bristol bargain, viz., the repayment by seven yearly instalments (m).

This jurisdiction was partly founded upon the laws against usury, and therefore did not apply to mere cases of excessive interest, in which extraordinary risk was incurred; which always justified, as it still justifies, the taking a security for interest beyond the usual rate, and even for a much larger principal sum than was really lent (n).

But although the mortgagee has acquired by the repeal of the usury laws, the power of demanding any amount of interest, neither the repeal of those laws, nor the enactment that no purchase, made *bond fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, shall be opened or set aside merely on the ground of undervalue (o), has lessened the power of the court over oppressive securities, but has rather increased the occasion for its exercise, both in

75; *Lake v. Brutton*, 8 De G. M. & G. 440; 25 L. J., Ch. 842. If the security consists of chattels, the debtor may recover them in trover. (*Blomfield v. Blake*, *supra*.)

(1) *James v. Oades*, 2 Vern. 402.

(m) *Fulthrope v. Foster*, 1 Vern. 477.

(n) *Potter v. Edwards*, 26 L. J., N. S., Ch. 468.

(o) 31 Vict. c. 4.

respect of securities taken from expectant heirs or reversioners (*p*); and in ordinary mortgages, where the mortgagee attempts to get a collateral advantage beyond his mere principal and interest; as by stipulating for commission or for a bonus in case of sale, or by making other exactions beyond the usual terms of the contract (*q*) (1539, 1578).

350. Mortgagees have also attempted to gain an undue advantage, by means of long leases from their mortgagors at fixed rents. It was, or is said to have been, the opinion of Lord Redesdale, that such a transaction would not be allowed (*r*). But although he said (*s*) it was the general impression that a lease by the mortgagor to the mortgagee could not stand, the parties not being able to deal upon equal terms, he said also that the person redeeming was to have the estate re-conveyed free from any incumbrance by the mortgagee (which he seemed to think would apply by reason of pressure to a lease obtained from the mortgagor); and that the effect of the lease would be to leave the mortgagee an advantage to himself after payment of his principal, interest and costs. Whence it seems evident that Lord Redesdale was speaking of such a lease as that upon the validity of which he was then deciding, viz., a lease for 999 years, at a rent no higher than would be reserved under a common occupation lease, and which was in effect, as he said, a departure with the inheritance (*t*). He observed also upon the distinction between such a lease and a lease for twenty-one years at a fair value, or a term in the nature of an occupation lease. And in a somewhat earlier case (*u*), Lord Redesdale is reported to have said, that in the simple case of a mortgagor giving a lease to a mortgagee, there was perhaps no ground to impeach the

(*p*) Per Turner, L. J., *Croft v. Graham*, 2 De G., J. & S. 155; *Emmet v. Tottenham*, 12 L. T., N. S. 838; 10 Jur., N. S. 1090; *Miller v. Cook*, L. R., 10 Eq. 641; *Tyler v. Yates*, id. 11 Eq. 265; 6 Ch. 665.

(*q*) *Broad v. Selfe*, 9 Jur., N. S. 885; *Barrett v. Hartley*, L. R., 2 Eq. 795.

(*r*) See *Morony v. O'Dea*, 1 Ba. & Be. 109.

(*s*) *Webb v. Rorke*, 2 Sch. & Lef. 661.

(*t*) See also the remarks of Lord Eldon and Lord Redesdale in the like case of *Hickes v. Cooke*, 4 Dow, 17.

(*u*) *Gubbins v. Creed*, 2 Sch. & Lef. 214.

lease; but that the court would look with great jealousy upon anything more, and that if the mortgagee took advantage of the distress of the mortgagor, or the latter made the lease in consideration of forbearance, it would be bad. So that upon considering the whole tendency of Lord Redesdale's remarks, it can hardly be said that Lord Manners differed from him judicially (*x*) when he upheld a lease made by a mortgagor to a mortgagee, at a fair rent, for a period, at first of twenty-one years, and afterwards by renewal for a somewhat longer time, but with a proviso making it void upon payment of the mortgage money, the mortgagee afterwards offering upon payment to give up the lease.

In another case in Ireland, before Lord St. Leonards, a prior mortgagee, who had obtained leases subsequent to the *puisne* mortgage, was charged as a mortgagee in possession, and not as lessee; upon the principle that the rights of the *puisne* mortgagee against the estate could not be affected after the date of his security by any dealing between the mortgagor and the first mortgagee; but no question was raised as to the validity of the leases (*y*).

A lease by the mortgagor to the mortgagee will not be set aside when the value of the property has become changed by the lapse of many years since the making of the lease (*z*).

351. Assurances for which there was an inadequate or no consideration, and between the parties to which such a fiduciary or other relation existed, that the maker of the security may be assumed to have been misled, unable to form a correct judgment, or under the influence of the person in whose favour it was made, are liable to be set aside by courts of equity, or to be treated only as securities for so much money as can be proved to have been advanced with interest at a reasonable rate.

When therefore an inadequate consideration (which alone

(*x*) *Morony v. O'Dea*, 1 Ba. & Be. 109. Lord Manners clearly thought he was differing from Lord Redesdale; but perhaps he thought so from an imperfect knowledge of the case of Webb

v. Rorke, which was not then reported.

(*y*) *Gregg v. Arnott*, Ll. & G. t. Sugd. 246.

(*z*) *Hickes v. Cooke*, 4 Dow, 17.

gives no title to relief (*a*)) is given to a person who is of weak intellect, or subject to the influence which arises out of the relation of parent and child, or guardian and ward, or other like pressure (even though the actual relation may be at an end (*b*)), in a transaction with the person under whose influence he is or is supposed to be, or who by reason of a superior knowledge of the property or other circumstances is likely to have an advantage over him, he is entitled (*c*) to be relieved from the consequences; and it is for the other party to show that the grantor had such independent professional advice, that he could exercise a proper judgment, and was not misled by artifice or contrivance, the existence of which any false recital or suggestion in the security will tend to show (*d*).

352. The same equity is applied to contracts entered into by heirs, or other persons concerning their future or reversionary interests; as to which the Court of Chancery has gone far beyond the original principle of protecting young and improvident persons, whose expectations make them liable to imposition (*e*): insomuch that, in case of an inadequate consideration, a mortgage will be reduced to a security for the actual advance, with interest at the rate usually allowed in such cases by the court, although the expectant heir with whom the transaction was made was of full, and even of mature age, and was independently advised, and understood the nature of the bargain: and the onus of showing that it was reasonable and provident is thrown upon the mortgagee, and not the contrary upon the mortgagor (*f*) (349).

(*a*) *Harrison v. Guest*, 6 De G., M. & G. 424; 8 H. L. C. 481.

(*b*) *Hylton v. Hylton*, 2 Ves. 547.

(*c*) *Spencer v. Chase*, 9 Mod. 29; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 id. 58; *Archer v. Hudson*, 7 Beav. 551; *Kay v. Smith*, 21 id. 523; *Esey v. Lake*, 10 Hare, 260; *King v. Savery*, *Savery v. King*, 1 Sm. & G. 271; 5 H. L. C. 627; *Longmate v. Ledger*, 2 Gif. 157; *Harrison v. Guest*, *supra*.

(*d*) *Baker v. Bradley*, 7 De G., M. & G. 597.

(*e*) See remarks of Lord Hardwicke in *Walmesley v. Booth*, 2 Atk. 27. The interest of a tenant for life whose estate is subject to annuities and to the interest upon mortgages, is not a reversionary interest within the scope of this doctrine. (*Webster v. Cook*, L. R., 2 Ch. App. 542.)

(*f*) *Davis v. Duke of Marlborough*, 2 Sw. 139; *Emmet v. Tottenham*, 10 Jur., N. S. 1090; 12 L. T., N. S. 638; *Bromley v. Smith*, 26 Beav. 644; 5 Jur., N. S. 833.

The principle does not apply to a settlement made by an expectant heir upon his wife and children, although it be alleged to have been obtained on their behalf by undue influence (*g*).

353. Where the transaction takes the form of a sale, the conveyance will be directed to stand as a security for the amount actually found due, with interest, and in ordinary cases with costs, on the footing of a mortgage (*h*) (1600); and as in the case of a mortgage, the refusal of a tender of all that the person who dealt with the heir was entitled to receive, will be visited with an order that he shall pay the costs of the suit (*i*) (1612).

354. A security under the like circumstances will be ordered to stand for the sums actually advanced to, or for the benefit of, the owner of the expectancy. But where the case is tainted with fraud and misrepresentation, and it is not shown that the money was applied for the plaintiff's benefit, the security may be set aside unconditionally (*k*). The defendant, however, will generally, so far as subsequent events will permit, be placed in the same position as if the transaction had not taken place (*l*).

A similar jurisdiction has been exercised by courts of law over debts secured by warrants of attorney to enter up judgment; execution upon which for an excessive sum has been set aside or reduced to a just amount, to be fixed by an officer of the court or a jury (*m*).

355. Solicitors also take securities from their clients under the restraints which are applied by courts of equity in other cases, as a check upon the exercise of undue influence; the relation between solicitors and their clients being so easily abused to

(*g*) *Shafto v. Adams*, 4 Gif. 492; 10 Jur., N. S. 121.

(*h*) *Peacock v. Evans*, 16 Ves. 512; *Davis v. Duke of Marlborough*, 2 Sw. 189, note; Sugd. V. & P. 326, ed. 11; 286, ed. 14.

(*i*) *Tottenham v. Emmet*, 11 L. T., N. S. 404; 12 id. 838.

(*k*) *Kay v. Smith*, 21 Beav. 522.

(*l*) *Savery v. King*, 5 H. L. C. 627.

(*m*) *Shaw v. Marquis of Worcester*, 6 Bing. 385, per Tindal, C. J.

the advantage of the former, that they are not allowed to deal upon the same footing as other persons. And although during the continuance of the relation the lapse of time may be a matter for consideration, it is said that the same weight is not due to it as when the relation does not subsist (*n*).

Hence, if a solicitor purchase or obtain a benefit from his client, the solicitor is bound to show that he has taken no advantage of his professional position, but has given every information and advice, and has protected the client's interests in the same manner as if he had dealt with a stranger; in default of proof whereof the deed will only stand as a security for the amount found to be due (*o*); and a gift or security for a gift pending the relation is absolutely void (*p*).

356. An assignment of the subject matter of a suit by the client to his solicitor, *pendente lite*, is good both at law and in equity, where it is made by way of security, because it is likely to be beneficial to the client (*q*); although a sale of such an interest is void at law for champerty or maintenance (*r*), and in equity will stand only as a security for the money advanced (*s*).

357. The rules of equity as to securities given by the client, require that the debt secured shall have been advanced, or shall otherwise be actually due; that the amount, if not ascertained at the time, shall be capable of being ascertained (the onus of the inquiry being on the solicitor), and that there be no unusual provisions by which the client may be injured or kept in the solicitor's hands. And if any greater advantage be given to the solicitor than the law would give him (such as

(*n*) Per Turner, L. J., 4 De G. & J. 96.

(*o*) *Cane v. Allen*, 2 Dow, 289; *Gibson v. Jeyes*, 6 Ves. 266; *Higgins v. Joyce*, 2 J. & L. 282; *King v. Savery*, 1 Sm. & G. 271; 5 H. L. C. 627; *Welles v. Middleton*, 1 Cox, 112; *Holman v. Loynes*, 18 Jur. 843; *Montesquieu v. Sandys*, 18 Ves. 313; *Tomson v. Judge*, 3 Dr. 306; and see

Gresley v. Mousley, 1 Gif. 450; 4 De G. & J. 78; 5 Jur., N. S. 583.

(*p*) *Newman v. Payne*, 2 Ves. J. 199; 4 Bro. C. C. 350.

(*q*) *Anderson v. Radcliffe*, E., B. & E. 816; *Wood v. Downes*, 18 Ves. 120.

(*r*) *Simpson v. Lamb*, 7 E. & B. 84.

(*s*) *Wood v. Downes*, *supra*.

interest on his costs) (*t*), then that the client should first have been informed of his rights.

Where no objection arises upon these grounds the security will be valid; and even where the consideration is money due on an account, if the account have been properly investigated and settled between the parties, the mortgage will not be disturbed, nor the solicitor restrained in the exercise of his remedies (*u*).

Nor where the debt is *bonâ fide* will the security be invalid, because it was made under pressure from the solicitor, or included in a security for other money obtained to relieve the urgent necessities of the mortgagor (*x*). If the security be oppressive in form, as by an unreasonable postponement of the time for redemption, the mortgagor will have the same rights as if the common form of security had been used; and where there has been concealment or misrepresentation in obtaining or framing the security, the mortgage will be valid only for so much as on taking the accounts shall appear to be actually due (*y*). The same rule is observed both as to legal and equitable securities for costs or advances the amount of which has not been fixed, or where bills for the costs have not been delivered; and the amount due on such securities for costs will be ascertained by taxation (*z*). But where several years had elapsed after the relation of solicitor and client had ceased, and no fraud or special error being alleged, taxation had been offered, and the client had enjoyed a benefit under the security, the accounts were not opened though no bills were delivered till after the date of the mortgage (*a*).

(*t*) *Lyddon v. Moss*, 5 Jur., N. S. 637.

(*u*) *Judd v. Olland*, 5 Jur., N. S. 755; *Jones v. Roberts*, 9 Beav. 419; see *Nelson v. Booth*, 5 W. R. 722.

(*x*) *Johnson v. Fesemeyer*, 25 Beav. 88; 3 De G. & J. 18; *Pearson v. Benson*, 28 Beav. 598; *Cheslyn v. Dalby*, 2 Y. & C. 170.

(*y*) *Cowdry v. Day*, 1 Gif. 816; 5 Jur., N. S. 1199; *Dunstan v. Paterson*, 11 Jur. 96; *Thomas v. Lloyd*, 3 Jur., N. S. 288.

(*z*) *Newman v. Payne*, 2 Ves. J. 199; 4 Bro. C. C. 360; *Harrison v. Wiltshire*, 2 Jur. 679; *Sandon v. Hooper*, 6 Beav. 183; *Davies v. Parry*, 1 Gif. 174; *Bristow v. Warner*, 10 Ir. Eq. Rep. 246, as to equitable security notwithstanding *Bovill, Exp.*, 2 M. & A. 382, n. See *Philby v. Hazle*, 29 L. J., C. P. 370. But see 33 & 34 Vict. c. 28, s. 4.

(*a*) *Blaggrave v. Routh*, 2 K. & J. 509; 3 Jur., N. S. 399; 8 De G., M. & G. 621. But it seems that something

The client cannot set up in answer to a suit to foreclose a mortgage, or to an action on a note or other security which he has given for costs, the provision of the Solicitors Act, 6 & 7 Vict. c. 73, s. 37, which requires delivery of the bill a month before action brought; the statute being inapplicable to an action on the security (*b*).

Where a mortgagee being solicitor for the mortgagor neglects his duty towards him, as by omitting to register the mortgage when it requires registration under a statute, he will not be allowed to avail himself of it, even though it be not avoided by the non-registration (*c*).

358. The rule which made void securities for costs not yet incurred has been abolished, and a solicitor may take security for his future fees, charges and disbursements to be ascertained by taxation or otherwise (*d*).

Of Securities which are affected by the Nature of the Consideration; and herein of immoral Securities.

359. A security which is given for an immoral consideration is void both at law and in equity. The common example of this kind of security is where a mortgage or annuity bond or deed is given to a woman in consideration of illicit intercourse with the grantor or obligor.

The instrument is void both at law and in equity where the consideration, whether performed or not, and though partly for value, is wholly or in part for future illicit intercourse, or for giving facilities for obtaining or carrying it on (*e*). Where the security is given as a consideration for past cohabitation, or during its continuance, either simply or in such a form as to induce the woman to put an end to rather than to continue the

equivalent to affrmance is necessary, besides lapse of time; unless perhaps the bare acquiescence were for a very long period. (*Lyddon v. Moss*, 5 Jur., N. S. 637.)

(*b*) *Thomas v. Cross*, 10 Jur., N. S. 1163; *Jeffreys v. Evans*, 14 M. & W. 210.

(*c*) *Patent Bread Machinery Co., Re*, L. R., 7 Ch. 289.

(*d*) 33 & 34 Vict. c. 28 (the Attorneys and Solicitors Act, 1870), s. 16.

(*e*) *Gray v. Mathias*, 5 Ves. 286; *Bullmore v. Willyama*, 32 Beav. 574; 9 Jur., N. S. 1115; 33 L. J., Ch. 461.

connection, it will be good, though the connection continue after the date of the security, unless it be shown that the continuance was the real consideration (*f*). Distinctions which appear to have been made in earlier cases, where the consideration was *præmium pudicitæ*, and where a party to the immoral contract came for relief (*g*), have been dropped or qualified; and the dictum (*h*), that although the latter could have no relief his personal representative might, has been overruled (*i*). A party to the contract may now have discovery in aid of his defence against an action on an instrument upon the face of which the illegal consideration does not appear, unless the discovery be sought from a participator who by giving it would be exposed to penalties (*k*). And he may have full relief in equity unless his case be mixed up with complaints, contaminated with the original immoral purpose (*l*), or unless the illegal consideration is so apparent on the face of the document that it would be held void at law, independently of the statements in the pleadings (*m*). And a transaction which has been completed by a transfer of property, and which being free from any appearance of illegal consideration is valid at law, cannot be set aside like an obligation *in fieri* by the donor, on the mere ground of the illegality of his intention in making it (*n*).

360. Securities given as a reward for procurement of marriage (commonly called *marriage brocade*) with a particular person, are also void, as contrary to that freedom of choice in marriage which is encouraged by public policy. Such securities may be ordered to be delivered up, and sums already paid under them to be returned (*o*); and it is said

(*f*) *Gray v. Mathias*, *supra*; *Hill v. Spencer*, *Ambler*, 641; *Dillon v. Jones*, cited 5 *Ves.* 291; *Gibson v. Dickie*, 3 *M. & S.* 463; *Hall v. Palmer*, 3 *Hare*, 532.

(*g*) See *Priest v. Parrot*, 2 *Ves.* 160; *Bainham v. Manning*, 2 *Vern.* 241; *Matthews v. Hanbury*, 2 *Vern.* 187.

(*h*) 2 *Vern.* 188.

(*i*) Per Lord Selborne, *Ayerst v. Jenkins*, *L. R.*, 16 *Eq.* 275.

(*k*) *Franco v. Bolton*, 3 *Ves.* 368; *Benyon v. Nettlefold*, 3 *M. & G.* 94. See *Ayerst v. Jenkins*, *supra*.

(*l*) *Batty v. Chester*, 5 *Beav.* 103.

(*m*) *Smythe v. Griffin*, 13 *Sim.* 245.

(*n*) *Ayerst v. Jenkins*, *supra*.

(*o*) *Drury v. Hooke*, 1 *Vern.* 411; *Stribblehill v. Brett*, 2 *Vern.* 445; *Smith v. Brunning*, *id.* 392; see *Smith v. Aykwell*, 3 *Atk.* 566.

that if they are at all capable of confirmation, it can be only done with a particular knowledge of the circumstances, and not by a general release of the remedy against them (*p*). This rule, however, does not necessarily invalidate an agreement made by both the persons about to marry, to pay to another a sum of money upon their marriage, because the circumstances negative the presumption that any imposition has been practised against either of them (*q*).

361. The same policy invalidates securities made as a reward for the use of influence over any person, to induce him to dispose of his estate for the benefit of the maker of the security. But in this, as in some cases of marriage brokerage securities, it may be that the plaintiff will not have costs, because he is *particeps criminis* (*r*).

362. Upon the same principle of public policy, securities given for obtaining or for procuring the sale of a public office of trust are void, whether the office be or be not one the sale of which is forbidden by statute (*s*) (**372**).

363. By the statute of 16 Car. 2, c. 7, s. 3, no payment of a sum of money exceeding 100*l.* lost at gaming on ticket or credit could be compelled; and all securities for satisfaction of such money were declared void. And by 9 Anne, c. 14, s. 1, all notes, bonds, judgments, mortgages or other securities, the whole or part of the consideration of which was money or other valuables won by gaming, or playing at or betting on any games, or for the repayment of money knowingly lent for such gaming or betting, or at the time or place of such play to any person gaming or betting, were declared void. And where such mortgages or securities were of or affected lands, tenements or hereditaments, the mortgages or securities were to enure for the benefit of the persons who should have or be

(*p*) *Shirley v. Martin*, 3 P. W. 74, n.
Per Lord Hardwicke, *Cole v. Gibson*,
1 Ves. 506.

(*q*) Per Lord Hardwicke, 1 Ves. 507.

(*r*) *Debenham v. Ox*, 1 Ves. 276.

(*s*) *Law v. Law*, 3 P. W. 391;
Stackpole v. Earle, 2 Wils. 132.

entitled to the hereditaments in case the grantor or person incumbering the same had been dead, and as if the securities had been made to the persons next entitled after the decease of the person so incumbering the same. But to remedy the injustice done to purchasers for valuable consideration of such securities, without notice of the original consideration, it was enacted by 5 & 6 Will. 4, c. 41, that so much of the above-mentioned and of several earlier acts as declared that any notes, bills or mortgages should be void, together with the enactment in favour of the persons next entitled, should be repealed; but every note, bill or mortgage which by virtue of the partly repealed acts would have been void, was to be taken to have been made for an illegal consideration. And if any person should pay to an indorsee, holder or assignee of such note, bill or mortgage, the whole or part of the amount thereby secured, the money was to be taken to have been paid on account of the person to whom the security was given upon such illegal consideration, and to be a debt due and recoverable by action from him, to the person who should have paid the money. Money paid in respect of an illegal security may be recovered under this statute, either on debt or assumpsit, and if the security be given for interest as well as principal the interest is also recoverable (*t*).

364. By 8 & 9 Vict. c. 109, the unrepealed and unaltered parts of the acts of Charles 2 and of Anne, and other acts, were repealed; and all contracts or agreements by parol or in writing by way of gaming or wagering were declared void. And it was enacted that no suit should be brought in any court of law or equity to recover any money or valuable alleged to be won upon wager, or which should have been deposited to abide the event of a wager, save as to subscriptions to prizes for the winner of any lawful game (*u*). The effect of this provision is only to make a contract void which is affected by it, but not to make it illegal; so that money paid for one who loses a wager, at his request, is recoverable (*x*).

(*t*) *Gilpin v. Clutterbuck*, 13 L. T.
71, 159.

(*u*) Sects. 15, 18.

(*x*) *Jessopp v. Lutwyche*, 10 Ex.

It has been intimated, that the *bonâ fide* assignee (without notice of the illegal consideration) of a bond, and consequently of the other forms of security mentioned in the statute of Anne, but not expressly mentioned in that of Will. 4, is within the equity of the latter statute (*y*). And that the contract, as well as the security for money (*z*) won at play, was avoided by the latter, or at all events by the combined effect of the two statutes.

It appears, however, that if in an action for money the illegality of the contract under 8 & 9 Vict. c. 109, be not set up, an adverse judgment obtained in the action cannot be impeached; for the statutes of Charles and Anne did not affect an adverse judgment, or even a *cognovit* given in an adverse action (*a*). And the act of Will. 4 only dealt with such securities as were avoided by these statutes; while the statute of Victoria avoids only contracts or agreements, which, as appears above, do not include securities obtained adversely.

365. By 18 Geo. 2, c. 34, courts of equity were specially empowered to proceed and decree upon suits brought to enforce payment under transactions contrary to the statute of Anne; and in several cases have accordingly given relief, by ordering the delivery up of securities, as well where they were given directly for the gaming debt as where they were given abroad in exchange for the original gaming securities, and where they were given after the completion of the first transaction (*b*).

366. The statute of Anne enacted (*c*), that persons liable to be sued for money or valuables, under the statute, should

614; *Rosewarne v. Billing*, 15 C. B., N. S. 316; *Fitch v. Jones*, 5 E. & B. 238. For the distinction where the transaction is illegal, and subject to penalties, see *Fisher v. Bridges*, 3 E. & B. 642.

(*y*) *Hawker v. Hallewell*, 3 Sm. & G. 194.

(*z*) *Applegarth v. Colley*, 10 M. & W. 723. And see as to the Statute of

Anne, Young v. Moore, 2 Wils. 67.

(*a*) *Lane v. Chapman*, 11 Ad. & El. 366, 980; and see *Coots, Mort. Bk. 5*, Ch. 2.

(*b*) *Newman v. Franco*, 2 Anst. 519; *Andrews v. Berry*, 3 id. 624; *Rawden v. Shadwell*, Amb. 269; *Wynne v. Callandar*, 1 Russ. 293; *Parker v. Alcock*, Younge, 361.

(*c*) Sect 3.

be compelled to give discovery. But the plaintiff was bound to separate matters in respect of which he was entitled to an answer, from those which the defendant was not bound to answer. If this were not done, the defendant was not bound to answer any of the matters (*d*). The repeal by 8 & 9 Vict. c. 109, of the act of Anne, and of that part of the act of Geo. 2, which relates to it, appears to leave the matter subject to the general rules of courts of equity concerning answers which would expose a defendant to criminal prosecution.

367. If a loan be placed by the lender in the hands of the borrower, as the lawful owner of it to dispose of as he pleases, a security for its repayment will be good, although the lender may have expected to be paid out of it the amount of bets won by him from the borrower; but if it were lent under an agreement that the bets should be paid out of it, the security will be bad as a colourable evasion of 9 Anne, c. 14, and 5 & 6 Will. 4, c. 41 (*e*).

A bond to secure monies agreed to be paid to avoid pecuniary and other liabilities arising from the non-payment of racing debts is good (*f*).

368. It is a misdemeanor for any person adjudged bankrupt, and for any person whose affairs are liquidated in pursuance of the Bankruptcy Act, 1869, punishable with imprisonment for any term not exceeding two years, with or without hard labour, if he be guilty of any false representation or other fraud, for the purpose of obtaining the consent of his creditors or any of them, to any agreement with reference to his affairs or his bankruptcy or liquidation (*g*).

(*d*) *Earl Lichfield v. Bond*, 6 Beav. 88.

(*e*) *Hill v. Fox*, 4 H. & N. 359.

(*f*) *Bubb v. Yelverton*, L. R., 9 Eq. 471; and see, as to the legality of such a debt in other respects, *Johnson v. Lasley*, 12 C. B. 468.

(*g*) The Debtors Act, 1869, 32 & 33

Vict. c. 62, s. 11 (16). As to corrupt agreements with creditors, in Irish bankruptcies, for forbearing to oppose, or consenting to allowance of certificate, or agreeing to accept offer of composition or proposal of arranging debtor, see Bankruptcy (Ireland) Amendment Act, 1872, c. 58, s. 76.

369. Upon the general principle that private arrangements between debtors and particular creditors relating to their debts, are fraudulent as against the general body of creditors, courts of law and equity have always considered as void securities the consideration for which is the withdrawal of the creditor's opposition in the bankruptcy of the debtor (*h*); or given for a debt omitted from the schedule and secretly held in suspense until the discharge of the bankrupt (*i*); or taken privately for the balance of a debt for which the creditor appears to accept a composition, although no creditor be actually induced by the fraud to come in (*k*); and the amount received in respect of such security has been allowed to be recovered by the assignees of the bankrupt debtor (*l*).

370. Securities for the payment of money to persons who would be injured by the passing of a private bill through parliament, in consideration of the withdrawal of their opposition to the bill, are not illegal (*m*).

371. A debt arises by robbery, from the robber to the person robbed; and though the civil remedy of the latter be suspended until the conviction of the offender, the debt is a good consideration for a security made by him before that event for the sum stolen (*n*).

A security given in consideration that the grantee shall cease to do an illegal act, is not on that account illegal; but as there is no valuable consideration, the transaction is merely voluntary (*o*).

(*h*) *Jackson v. Davison*, 4 R. & Al. 691; *Rogers v. Kingston*, 2 Bing. 441.

(*i*) *Tabram v. Freeman*, 4 Tyr. 180.

(*k*) *Middleton v. Lord Onslow*, 1 P. W. 768; *Cockshott v. Bennett*, 2 T. R. 763; *Fawcett v. Gee*, 3 Anst. 910; *Jackman v. Mitchell*, 15 Ves. 581; *Pendlebury v. Walker*, 4 Y. & C. 424.

(*l*) *Alsager v. Spalding*, 6 Sc. 204.

(*m*) *Vauxhall Bridge Co. v. Spencer*, Jac. 64; see *Lord Petre v. Eastern Counties Rail. Co.*, 1 Ry. Cas. 462.

(*n*) *Chowne v. Baylis*, 81 Beav. 351; see *Dudley Banking Co. v. Spittle*, 1 J. & H. 14.

(*o*) *Eddison v. Rothery*, 10 Jur., N. S. 948.

Of Securities which are affected by the Nature of the Security.—Of Securities upon the Profits of Offices.

372. The sale of public offices is *malum in se*, independently of the statute law (*p*). But by a statute of Edward 6, all assurances of any office concerning the administration or execution of justice, or any service of trust, or the receipt, control or payment of the king's revenues or customs, or the custody of fortresses, or the clerkship in any court of record where justice is to be administered, were declared to be void as against the person making the assurance, with an exception in favour of offices of inheritance and of the keeping of parks or forests (*q*). This act (preserving the exceptions) was afterwards extended (*r*) to Scotland and Ireland, and to all offices in the gift of the Crown, civil, naval and military commissions and employments under the control of the different officers of state.

Another statute (*s*) declares to be void all assignments of any pay, pension, allowance or relief, payable to any officer or person who has served in the king's forces, or any widow of any such officer, or any person receiving any allowance or pension on the compassionate list, or any pension, allowance or relief in respect of any military service.

Bills of sale, contracts and assignments of any pay, wages or allowances of money of any kind, due or to grow due to any seaman in the service of the Crown, are also void (*t*).

373. The accruing full (*u*) or half-pay of military or naval officers in the service of the Crown (**635**) cannot, for reasons of public policy, be assigned by law (*x*); because the alienation

(*p*) *Stackpole v. Earle*, 2 Wils. 133.

(*q*) 5 & 6 Edw. 6, c. 16.

(*r*) 49 Geo. 3, c. 126.

(*s*) 47 Geo. 3, c. 25, s. 4.

(*t*) 1 Geo. 2, stat. 2, c. 14, s. 7.

(*u*) *Barwick v. Reade*, 1 H. Bl. 627.

(*v*) *Flarty v. Odiam*, 3 T. R. 681.

Approved by Lord Alvanley, in *Arbuckle v. Cowtan*, 3 B. & P. 328. The rule also prevented an officer in the army from pledging his commission, or

giving any right with respect to it beyond the assignment of the purchase-money in the hands of his agent after the sale of the commission (*Collyer v. Fallon*, T. & R. 459; *L'Estrange v. L'Estrange*, 13 Beav. 281; *Somerset v. Cox*, 83 Beav. 634); but did not apply to a sum received by an officer upon going on half-pay. (*Price v. Lovett*, 15 Jar. 786.)

of the stipends of officers and others in the public service, who receive allowances upon the terms that they are to remain liable to serve the Crown when required, would prevent their prompt attention when they are called upon to fulfil their duties (*y*). And it is provided by statute that all assignments of or securities upon the half-pay, pensions or allowances of officers, or other persons engaged in the military service of the Crown, are void (*z*). But where the assignment is not expressly forbidden by statute, and the grant of the pension does not imply the performance of any future duty to the state, with the performance of which the assignment might interfere, the assignment will be good. Pensions granted for wounds received in the service of the Crown (*a*), or to an officer of the Indian navy (which has ceased to exist) (*b*), or otherwise for past services (*c*), or to a *quasi* public officer in consequence of an alteration in the law which has deprived him of his emoluments (*d*), may therefore be assigned; and since the transfer to the Crown of the forces of the East India Company (*e*), an assignment of a pension granted to an officer of the Company's service has been supported, on the ground that not having been granted by the Crown, or taken from monies under the control of parliament, the assignment was not within the mischief of the statutes. But the observations of Lord Westbury, C. on the hearing of the appeal, and the compromise of the case by his desire, make it doubtful whether the decision would have been supported (*f*). Prize money is not within the prohibi-

(*y*) 2 Beav. 549; *Stone v. Lidderdale*, 2 Anst. 533; *McCarthy v. Goold*, 1 Ba. & Be. 389; *Wells v. Foster*, 8 M. & W. 149.

(*z*) 46 Geo. 3, c. 69, s. 7; and 47 Geo. 3, sess. 2, c. 25, s. 4; *Lloyd v. Cheetham*, 3 Gif. 171; 7 Jur., N. S. 1272.

(*a*) *Knight v. Bulkeley*, 4 Jur., N. S. 527; 5 id. 817.

(*b*) *Dent v. Dent*, L. R., 1 P. & D. 366. See *James v. Ellis*, 19 W. R. 319.

(*c*) *Heald v. Hay*, 3 Gif. 467; 8 Jur., N. S. 379.

(*d*) *Shower v. Payne*, 18 L. J., Ch. 401.

(*e*) 21 & 22 Vict. c. 106 (1858).

(*f*) *Carew v. Cooper*, 4 Gif. 619; 10 Jur., N. S. 11, 429. A retiring military pension granted by the Company has been held not to pass to the assignees on the bankruptcy of the pensioner, on the ground that not being granted under the common seal of the Company they could not be made liable in a court of law for payment of it. (*Gibson v. East India Co.*, 5 Hag. N. C. 262.)

tion, and an assignment even of the captor's inchoate or possible interest in it before grant by the Crown will be supported in equity (*g*). An assignment of a revocable pension, granted as compensation for the loss of a civil office, has been enforced without prejudice to the rights of the Treasury, or of the heads of the department in which the office was held (*h*). It has been held otherwise as to a pension granted for the support of a dignity, and as a reward for great services: although in the case which raised the question the receipts of the grantee and his successors had been expressly declared to be the proper discharges for the pension (*i*).

The emoluments of a clerk of the peace cannot be assigned (*j*). But it was held, that the assignment by a judge of one of the supreme courts in India, of the money directed to be paid to his representative by the statute 6 Geo. 4, c. 85, if he should die in, and after six months' possession of office, was valid; and that not being payable during the life of the judge, it was not an assignment of the salary within the statutes of Edw. 6 and 49 Geo. 3 (*k*).

374. The trustee during bankruptcy, and the registrar after the close of it is, however, empowered to receive for distribution among the creditors so much of the pay, half-pay, salary, emolument or pension of any bankrupt who is or has been an officer of the army or navy, or an officer, clerk or otherwise employed in the civil service of the Crown, or in the enjoyment of any pension or compensation granted by the Treasury, as the court upon the application of the trustee thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of the department under which the income is enjoyed,

(*g*) *Alexander v. Duke of Wellington*, 2 R. & M. 85.

(*A*) *Tunstall v. Boothby*, 10 Sim. 542; *Spencer v. Cox*, 2 Anst. 535, n.

(*i*) *Davis v. Duke of Marlborough*, 1 Sw. 74.

(*j*) *Palmer v. Bate*, 6 Mo. 28.

(*k*) *Arbuthnot v. Norton*, 5 Moo. P.

C. 219; 3 Moo. C. J. 435. As to civil superannuation allowances, see *Jones v. East India Co.*, 17 C. B. 851; *Hawker, Exp.*, L. R., 7 Ch. 216. Retiring allowance to civil servant of East India Company does not pass to trustee in bankruptcy, and cannot be taken in execution.

directs (*l*). And as to any other salary or income the court may make order for its payment to the trustee or registrar and its subsequent application (*m*).

375. The validity of securities upon the profits arising from the fellowships of colleges (**634**) has been the subject of conflicting decisions upon applications to enforce them by the appointment of a receiver. Upon one occasion (*n*) a motion for a receiver was dismissed with costs, but it was afterwards held (*o*) that there might be a receiver, both of past and future appropriations, in respect of the profits of a fellowship of the same college, the duties being so slight that no question of public policy could interfere with the validity of the assignment. And so it has been held (*p*) as to the canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence and of attendance on divine service; the performance of which duty by the canon is of no benefit to the public. But a mortgage of a canonry with the lands belonging to it cannot be enforced by ejectment, the canonry being only the name of an ecclesiastical office, and the owner of it having no property in the lands (*q*).

Of Securities upon Ecclesiastical Benefices.

376. Charges upon the profits of ecclesiastical benefices •
• (**636, 773**) are forbidden by the statute 13 Eliz. c. 20, repealed by 43 Geo. 3, c. 84, and revived on the repeal of the latter statute by 57 Geo. 3, c. 99; but they may be mortgaged for certain purposes under the statutes and subject to the provisions mentioned in the Appendix.

Of Securities upon Property forbidden to be incumbered.

377. A security may also be ineffectual by reason of some limitation or contract, under which the estate or interest

(*l*) 32 & 33 Vict. c. 71, s. 89.

(*m*) *Id.* s. 90.

(*n*) *Berkeley v. King's College*, 10 Beav. 602.

(*o*) *Feistel v. King's College*, 10

Beav. 491.

(*p*) *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544.

(*q*) *Doe d. Butcher v. Musgrave*, 1

Man. & G. 625; 1 Sc. N. R. 451.

of the maker, in the subject of it, is made to cease upon his creating or attempting to create an incumbrance thereon.

Where the prohibition extends to an attempt to incumber, a forfeiture is only created by an act which, but for the prohibition, would have the effect of an assignment or security upon the property. An offer to give a security will not create a forfeiture, much less the expression of a desire to create an incumbrance, and the taking advice as to the power to do so (*r*).

378. In construing these provisions the question is, whether the event has occurred upon which it was provided that the property should go over. Where the terms of the prohibition are contained in a covenant by a lessee, a covenant not to transfer, assign, or otherwise part with the demised property or the lease, is not broken (*s*) by a deposit of the lease by way of equitable mortgage; the effect of such a covenant being only to restrain the alienation of the legal interest, to the prejudice of the lessor; and the depositee may obtain the usual order for sale in bankruptcy. So the contracting and non-payment of debts, and the giving as collateral security a warrant of attorney or cognovit under which judgment is entered up, and execution issued, is no breach of the covenant not to incumber (*t*), for the reason already noticed (157), that such a security, when given *bonâ fide* and not for the purpose of evading a restriction upon alienation, does not differ in character from an adverse judgment, and because *non constat* that the property will be taken under that judgment; and also where the covenant does not extend to the doing of any act whereby the property may be incumbered, because the giving such security does not amount to a direct charge or incumbrance. But the filing a declaration of insol-

(*r*) *Graham v. Lee*, 23 Beav. 388; 3 Jur., N. S. 551; *Jones v. Wyse*, 2 Keen, 285.

(*s*) *Doe d. Pitt v. Hogg*, 1 Car. & P. 160; 4 Dow. & Ry. 226; S. C., 1 Ry. & M. 36; *Drake, Exp.*, 1 M., D. & De G. 539; and see *Doe d. Goodbehere*.

v. Bevan, 3 M. & S. 353.

(*t*) *Doe d. Mitchinson v. Carter*, 8 T. R. 57, 800; *Croft v. Lumley*, 5 El. & Bl. 648, 682; 4 Jur., N. S. 903; 6 H. L. C. 672; *Avison v. Holmes*, 1 J. & H. 530; *Seymour v. Lucas*, 1 D. & S. 177.

veney is a breach of the covenant (*u*); and an equitable mortgage by deposit, coupled with a warrant of attorney under which judgment was entered up, and execution issued, has been held (*v*) to determine the interest of a devisee under a conditional limitation, by which the estate was to go over if the devisee should dispose of or sell the property; because these being voluntary acts, which give the creditor a specific lien, and a right to sale in equity, and show a purpose to part with the possession, the judgment and execution had not the adverse character which is usually imputed to voluntary judgments. And a charging order under 1 & 2 Vict. c. 110, s. 14, will determine a life interest, which is made determinable on the execution or suffering of an act by which it should be incumbered at law or in equity (*x*).

379. A petition for adjudication in bankruptcy causes a *prima facie* alienation within the words "by any act or default or by operation of law;" but the forfeiture does not take effect if the bankruptcy be annulled, and the property be intercepted before it passes into other hands (*y*); otherwise, if it be annulled upon the terms that the past dividends shall be paid to the assignee (*z*). A forfeiture on bankruptcy, although coupled in the will which contains it with words of futurity, applies to a bankruptcy during the life of the testator (*a*).

(*u*) *Hill v. Cowdery*, 1 H. & N. 360.

(*v*) *Doe d. Norfolk v. Hawke*, 2 East, 480.

(*x*) *Montefiore v. Behrens*, L. R., 1 Eq. 171; 35 Beav. 95; *Roffey v. Bent*, L. R., 3 Eq. 759.

(*y*) *White v. Chitty*, L. R., 1 Eq. 372; *Lloyd v. Lloyd*, L. R., 2 Eq. 722. See *Hill v. Cowdery*, *supra*.

(*z*) *Parnham's Trusts*, Re, L. R., 13 Eq. 413.

(*a*) *White v. Chitty*, *supra*; *Trappes*

v. Meredith, L. R., 7 Ch. 248, following *Manning v. Chambers*, 1 De G. & S. 282; *Seymour v. Lucas*, 1 D. & S. 177. For other cases in which forfeiture may arise under alienation clauses, in cases not directly within the scope of this work, see *Crosbie v. Tooke*, 1 M. & R. 484; and cases cited in note to *Avison v. Holmes*, 1 K. & J. 540; *Wadham v. Marlowe*, 8 East, 314, n.; *Brady v. De Crespigny*, L. R., 4 Q. B. 183; *Slipper v. Tottenham, &c. Rail. Co.*, L. R., 4 Eq. 113.

380. A prohibition against incumbering the income of property will not invalidate a charge upon such income as has already become due at the date of the security (*b*).

CHAPTER III. PART 2.—OF SECURITIES MADE UNDER STATUTORY OR OTHER POWERS.

381. *Of Powers to mortgage.*

395. *Of Securities by Married Women.*

405. *Of Securities upon the Property of Infants.*

407. *Of Securities upon the Property of Lunatics.*

412. *Of Securities by Bankruptcy Trustees.*

413. *Of Securities by Trustees and Executors.*

428. *Of Securities by Agents—*

429. *Factors.*

442. *Bankers and Bill Brokers.*

444. *Partners.*

381. A power by which it is intended to authorize the raising of money on mortgage should expressly specify the intention. A mortgage may be made under a general power the terms of which are sufficiently extensive; as for instance by the agent of a ship-owner, of the passage-money of passengers, under a power to mortgage the vessel, and generally to do all acts about the business and affairs, which the owner could have done (*c*); and by the directors of a company, empowered to do all such things as could be done by the company without a general meeting; but a general power to sell, assign and transfer is not sufficient for the purpose (*d*). The donor of a power of doubtful sufficiency may, however, by directions as to its exercise, preclude himself from disputing the validity of a security made under the power (*e*).

(*b*) *Stulz, Exp.*, 4 De G., M. & G. 404.

(*c*) *Willis v. Palmer*, 6 Jur., N. S. 732; 7 C. B., N. S. 340; 29 L. J., C. P. 194.

(*d*) *Australian, &c. Co. v. Mounsey*, 4 K. & J. 733; *De Bouchont v. Goldsmid*, 5 Ves. 210.

(*e*) *Perry v. Holl*, 2 Gif. 138; 6 Jur., N. S. 661; 2 De G., F. & J. 38.

382. An instrument which authorizes the creditor of the principal to take possession and receive the profits of the estate till payment, operates not only as a power of attorney, but as an actual charge; and a power so operating is not revoked or revocable by the death or act of the debtor, though it be not expressly declared to be irrevocable (*f*). It is the same where the power is to sell; but such powers are only irrevocable when given as part of the security; and not when being given independently, the interest of the donee arises afterwards and incidentally,—as where goods are consigned to a factor for sale, upon which he afterwards makes advances (*g*).

383. The power must be exercised in accordance with the general terms of the instrument in which it is contained; so that a corporation having a general power by statute to mortgage their lands, cannot mortgage those which by the same act they are bound to sell within a limited time. Nor, where a mortgage is made under a provision that all mortgagees shall be on an equal footing, can an undue advantage be given to the creditor by a security upon other property belonging to the donees of the power (*h*).

384. The mortgage, however, is not invalid only because it is made to secure a debt originally contracted on an improper security; so it be clear that the mortgage is to secure the money, and not to support the invalid transaction. And a security made in excess of a power, but by which the estate passes, will be treated as valid in a foreclosure suit, and must be set aside, if at all, by an independent proceeding (*i*).

A mortgage purporting to be executed according to, but which is in contravention of, statutory powers, will be good by estoppel in favour of a purchaser for value without notice of the infirmity (*k*).

(*f*) *Spooner v. Sandilands*, 1 Y. & C. C. C. 390; *Walsh v. Whitcombe*, 2 Esp. 565; *Abbott v. Stratten*, 3 J. & L. 608, 612; *Gaussen v. Morton*, 10 B. & C. 731.

(*g*) *Smart v. Sanders*, 5 C. B. 895.

(*h*) *De Winton v. Mayor of Brecon*, 26 Beav. 533.

(*i*) *Scott v. Colburn*, 26 Beav. 276; 5 Jur., N. S. 188.

(*k*) *Webb v. Commissioners of Herne Bay*, L. R., 5 Q. B. 642.

385. A power to mortgage in a certain manner, is not inconsistent with the existence of a general right to mortgage property vested in the donees of the power, if they are not prohibited from so doing, and if they hold the property in a capacity, and mortgage it for purposes which do not affect the exercise or the objects of the power. Hence a mortgage by trustees of a public company of the plant, tools and machinery used in the construction of their works, is not *ultra vires*, although they were empowered by statute to mortgage in their corporate capacity the rates and tolls granted by the act; and the directors of a company who have power to borrow on mortgage to a certain amount, may mortgage the property of the company by debentures or deposit of deeds to secure a past debt (*l*). So, upon the principle that in equity whatever is agreed to be done, is done, effect will be given to an intention to create a security where the maker is of capacity to contract the debt, notwithstanding any mistake in the manner of doing it (*m*); or that it was done informally,—as, where a company empowered to raise money by debentures gave them to a contractor for the cost of work done, instead of issuing them to him for money and then handing him back the amount (*n*).

386. But if the maker of the security be not of capacity to contract the debt,—as if borrowing be expressly forbidden, or be authorized only subject to the performance of certain conditions, which have not been performed,—no debt will arise at law. So that where a company under such circumstances issued Lloyd's bonds (*o*), by mortgage of which money was

(*l*) *McCormick v. Parry*, 21 L. J., Exch. 148; 7 Exch. 355; Patent File Co., Re, L. R., 6 Ch. 83; *Imperial Merc. &c. Association v. London, Chatham and Dover Rail. Co.*, 15 W. R. 1187; *Inns of Court Hotel Co.*, Re, L. R., 6 Eq. 82; and the security may be made to the bankers of the company, as they are not officers of the company, upon whom it is incumbent to see that all the proper formalities have been complied with; *General Provident, &c. Co.*, Re, L. R., 14 Eq. 507.

(*m*) *Strand Music Hall Co.*, Re, 13 L. T., N. S., Ch. 177; 3 De G., J. & S. 147.

(*n*) *South Essex Gaslight Co.*, Re, 2 J. & H. 306; and see *Webb v. Commissioners of Herne Bay*, L. R., 5 Q. B. 654, per Blackburn, J.

(*o*) *Chambers v. Manchester and Milford Rail. Co.*, 5 B. & S. 588; 10 Jur., N. S. 700. A *Lloyd's bond* is an instrument under seal, amounting to an account stated and containing a promise to pay. In form the makers

raised to discharge a debt incurred for the use of the company, it was not only declared that the bonds were void as having being issued *ultra vires*, but that no debt was created against the company; because a corporation created for particular purposes is not bound at law by a deed under the corporate seal, where, by the express provision of or necessary implication from the statute which creates the corporation, the deed is *ultra vires* (*p*).

387. But money borrowed or contracted to be paid irregularly on behalf, but shown to have been *bonâ fide* applied for the use of a company by directors or shareholders, may be allowed to them on the winding-up of the company with simple interest; on the principle that as the money was applied in payment of recoverable debts, the lender should stand in the place of the creditor who was paid (*q*); though in the absence of evidence that the money was so applied, the advance will not be recognized (*r*). And so if a trustee improperly raise money by mortgage, although the security will be void against a

acknowledge themselves to be indebted to one in a certain sum for money due from them to him, and covenant for themselves, their heirs or successors and assigns, with the creditor, his executors and administrators, to pay to him, his executors, administrators and assigns, the money acknowledged to be due on a certain day, with interest, until payment as therein mentioned. It was thus intended to enable a company to give to contractors to whom the company were indebted for works, something upon which money might be realized, and for this purpose the security is said to be unobjectionable. But it cannot be used for raising money to discharge liabilities which the company could not legally contract. It cannot be valid as a security for a debt which does not exist, and cannot create a debt where there is none.

(*p*) *Per Parke, B., South Yorkshire, &c. Co. v. Great Northern Rail. Co.,*

9 Exch. 55. And as to the extent to which corporations may be bound by acts *ultra vires*, see *Mayor of Norwich v. Norfolk Rail. Co.*, 4 E. & B. 897, 413; *Bateman v. Mayor of Ashton*, 3 H. & N. 323.

(*q*) *German Mining Co., Re*, 4 De G., M. & G. 19; 18 Jur. 710; *Norwich Yarn Co., Re*, 22 Beav. 143; *Troup's case*, 29 Beav. 353; *Hoare's case*, 30 Beav. 225; *Benlah Park Estate, Re*, L. R., 15 Eq. 43; *International Life Assurance Co., Re*, id. 10 Eq. 312; and see *Prince of Wales Assurance Co. v. Harding, E. B. & E.* 183; and *Magdalena Steam Navigation Co., Re*, Joh. 690, which turned on the acquiescence of the shareholders; and see *Ernest v. Nicolla*, 6 H. L. C. 401; *Cork and Yonghal Rail. Co., Re*, L. R., 4 Ch. 748.

(*r*) *National Permanent, &c. Building Society, Re*, L. R., 5 Ch. 309.

mortgagee with notice, he may be a creditor(*s*) on the proceeds of the estate to the extent to which the money lent was properly applied in administration.

It seems that the committee of a building society, not specially authorized, cannot, for the purposes of the society, deposit, by way of equitable mortgage, the deeds of members which are subject to the claims of the society, and are liable to be separately redeemed by the owners(*t*).

388. Another proposition which appears to be deducible from the authorities, is, that where the statutory authority under which a company is established, contains no restrictions on the exercise of the borrowing power outside those of the deed of settlement which confers it, the lender is not bound to look beyond the deed of settlement; but finding that it empowers the company to borrow, may assume that it has done such preliminary acts as the passing of resolutions, &c. which the deed requires. But where the statutory authority provides specially what shall be evidence of the performance of the preliminary acts, the lender must see that they were properly done(*u*).

389. The power, whether special or general, must also be exercised only for purposes consistent with the objects of the trust or undertaking, for the furtherance of which it is given. Therefore, although a benefit building society if duly empowered by its rules may borrow a limited amount on mortgage for better carrying out the proper objects of the society(*x*), it cannot do so where, there being no express power, the rules show that borrowing would be inconsistent with its constitution(*y*); or where the money is raised for a purpose which is

(*s*) *Devaynes v. Robinson*, 24 Beav. 86; 3 Jur., N. S. 1143.

(*t*) *Moye v. Sparrow*, 18 W. R. 400.

(*u*) *Royal British Bank v. Turquand*, 6 E. & B. 327; *Agar v. Athénæum Life Assurance Co.*, 3 C. B., N. S. 725; *Athénæum Society*, Re, 4 K. & J. 549;

Fountaine v. Carmarthen Rail. Co., L. R., 5 Eq. 316.

(*x*) *Laing v. Reed*, L. R., 5 Ch. 4; *Moye v. Sparrow*, 18 W. R. 400; *Victoria, &c. Building Society*, Re, 19 Eq. 605.

(*y*) *National, &c. Building Society*, Re, L. R., 5 Ch. 309.

not a legitimate object of the society; and a loan applied to purposes beyond the power has been disallowed, though it did not appear that the lender had notice of the intended misapplication; but the society in such a case, or its liquidator, cannot be relieved against the security without paying the debt (z). In like manner the trustees of a chapel, empowered to raise a sum sufficient for the payment of all debts, have been restrained from mortgaging without necessity, and for a sum insufficient for that purpose (a). No a power in a marriage settlement, for the parents, with the consent of the trustees, to revoke the old and to declare new uses, cannot be exercised for the purpose of mortgaging the estate for the benefit of the father, and to the prejudice of the children entitled under the trusts (b).

390. This principle has also been applied in the construction of securities issued by railway companies (**633**) under the name of debentures, in which it is usual to assign, in terms more or less extensive, not only the tolls and rates arising from the undertaking, but also "the undertaking" itself; the word "undertaking," which was adopted (probably for the sake of conciseness) in the various statutes relating to public companies, and in the form of mortgage or debenture given in the Companies Clauses Act, 1845, being by the interpretation clause of the latter act only explained to mean "the undertaking or works of whatever nature which should by the special act be authorized to be executed;" and, by the like clause of the Railways Clauses Consolidation Act, signifying "the railway and works" authorized to be executed.

391. So far, however, as the operation of a debenture made under the former act depends upon the use of this word, it has been determined (c) that an assignment of the "general

(z) *Kent Benefit Building Society*, Re, 7 Jur., N. S. 1045; *Durham County, &c. Building Society*, Re, L. R., 12 Eq. 516; *Patent File Co.*, Re, L. R., 6 Ch. 87, per James, L. J.

(a) *Rigall v. Foster*, 18 Jur. 39.

(b) *Eland v. Baker*, 29 Beav. 137.

(c) *Gardner v. London, Chatham, and Dover Rail. Co.*, L. R., 2 Ch. 201. It should be observed that by the security in question the undertaking and tolls were assigned (as is usual in

undertaking" of a railway company imports, not the surplus or other lands, capital, rolling or other stock, or any other of the separate ingredients of which the whole undertaking is composed, nor even the whole undertaking as a thing, with the vitality of which the debenture holder, by exercising the ordinary remedies of a mortgagee, may interfere; but as concerns his power over it, the complete undertaking only, as a going concern or fruit-bearing tree, the produce of which and not the thing itself constitutes the security. The principal ground of this construction is, that a mortgage which would enable the creditor at his pleasure to enforce the ordinary remedies of a mortgagee against the whole or any particular part of the undertaking of the company, the debentures of which are in question, would be inconsistent with the primary object for the attainment of which the powers of the company (including the power of mortgaging) were granted,—as, in the case of a railway company, the object of making and maintaining a great public communication (*d*).

Before the force of the word "undertaking" had been thus declared, it had been held at law, that a mortgage of the undertaking, rates and tolls does not pass the land or the stock or property of a railway company as carriers (*e*); although in equity a debenture mortgage of the undertaking, and all tolls and monies arising by virtue of the act, was held to give the holder priority upon the proceeds arising from the sale of a railway over subsequent judgment creditors (*f*).

A debenture charge, however, upon the undertaking of a steam-ship or other company, not in the peculiar position of a

such cases) to the debenture holder, "his *executors, administrators and assigns*;" see *Doe v. Myatt v. St. Helen's Rail. Co.*, 2 Q. B. 365; *Wickham v. New Brunswick, &c. Rail. Co.*, L. R., 1 P. C. 64; 3 Mo. P. C., N. S. 417, where, however, there was an express proviso that the debentures should not be a charge upon the company's lands; and *Legg v. Mathieson*, 2 Gif. 71; 6 Jur., N. S. 1010; 29 L. J., Ch. 385, where under the Railways

Clauses Act the word "undertaking" was held to pass an interest in the land.

(*d*) As to the liability of a company and its creditors to use the property for the purposes of the undertaking, see further, *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 104, 125; *Potts v. Warwick, &c. Canal Co.*, Kay, 142.

(*e*) *Hart v. Eastern Union Rail. Co.*, 7 Exch. 246; 8 id. 116.

(*f*) *Furness v. Caterham Rail. Co.*, 27 Beav. 358.

railway company, and upon all sums of money arising therefrom, and all the estate, right, title and interest of the company therein; although it infers that the company will go on, and that the debenture holder cannot interfere until non-payment of interest or principal when due, or require an account of mesne profits, or interfere with the business, gives a charge upon the whole present and future property of the company, with a right when it is wound up to payment in priority to the general creditors; and it seems also a right upon non-payment to sue for the realization of the security (*g*).

392. The capital of a company will not pass by the words "property, and the receipts and revenues to arise therefrom." And the word "estate" in a mortgage of the lands, tenements and estate of a company and of all their undertaking, means estate *ejusdem generis* with lands and tenements, and does not comprise as part of the estate or undertaking unpaid calls, which are mere debts, or capital not called up (*h*). Nor can the directors of a company, under an authority to borrow on the security of the funds and property of the company, mortgage the subscribed capital not paid up, which is only *sub modo* the property of the company, and is to be raised by calls to be made at the discretion of the directors (*i*); there being no means of enforcing such a mortgage but by a receiver, to whom the discretion of the directors cannot be delegated. But the reason seems to be inconsistent with the fact that mortgages of future calls are expressly contemplated in the statutory form of mortgage provided in the Companies Clauses Consolidation Act (*k*). Where the call has already been made or determined upon by a resolution of the directors, or credit has been given upon the faith of a proposal to make a future call,

(*g*) *Panama, &c. Mail Co., Re*, L. R., 5 Ch. 318.

(*h*) *King v. Marshall*, 33 Beav. 565; 10 Jur., N. S. 921; *Marine Mansions Co., Re*, L. R., 4 Eq. 602.

(*i*) *British Provident, &c. Society, Re, Stanley, Exp.*, 10 Jur., N. S. 713; 4 De G., J. & S. 407; 33 L. J., Ch.

535; *Sankeybrook Coal Co., Re*, 10 Eq. 381; *Bank of South Australia v. Abrahams*, L. R., 6 P. C. 562.

(*k*) Sched. C.; and see *Wickham v. New Brunswick, &c. Rail. Co.*, L. R., 1 P. C. 64; 3 Mo. P. C., N. S. 417; *Colonial, &c. Gas Co.*, W. N. 1870, 258.

the call may be mortgaged under a power to mortgage the property and effects of the company (*l*). And for the purpose of paying a *bonâ fide* debt a company may mortgage a call already made before the time of payment without any special power (*m*).

393. A mortgage of a proportion of the toll-houses and gates of a public road passes an interest in the land upon which the mortgagee may bring ejectment, notwithstanding a proviso that the mortgagees shall be creditors on the tolls in equal degree (*n*); but a mortgage of the tolls, rates and duties only, gives no right to the land (*o*). Nor is a power to mortgage the toll-houses or gates included in a power to mortgage the undertaking and tolls (*p*).

394. A friendly society or any branch of such a society may, if the rules thereof so provide (and with a limitation as to benevolent societies), hold, purchase or take on lease any land in the names of its trustees for the time being in every county where it has an office, and may mortgage the same; and no mortgagee shall be bound to enquire as to the authority for any mortgage by the trustees; and the receipt of the trustees shall be a discharge for all monies arising from or in connexion with such mortgage (*q*) (**389**).

Of Securities by Married Women.

395. By virtue of the Fines and Recoveries Act (*r*), a married woman, with the consent of her husband, may mort-

(*l*) *Sankeybrook Coal Co.*, Re, 9 Eq. 721; 10 id. 381; *International Life Assurance Society*, Re, 10 Eq. 312; but see *New Clydach, &c. Co.*, Re, 6 Eq. 514, where it was held that debentures, purporting to assign the undertaking and the real and personal estate of the company, did not pass after-acquired property. That book debts not yet accrued are within a power to mortgage the property of the company, see *Bloomer v. Union Coal and Iron Co.*, L. R. 16 Eq. 383; but *qy*.

(*m*) *Pickering v. Ilfracombe Rail. Co.*, L. R., 3 C. P. 235.

(*n*) *Doe d. Banks v. Booth*, 2 Bos. & P. 219.

(*o*) *Perkins v. Deptford Pier Co.*, 13 Sim. 277. See *Walker v. Milne*, 13 Jur. 933.

(*p*) *Fairtitle v. Gilbert*, 2 T. R. 169; *Doe d. Myatt v. St. Helen's Rail. Co.*, 2 Q. B. 365.

(*q*) *Friendly Societies Act, 1875*, c. 60, s. 16 (2).

(*r*) 3 & 4 Will. 4, c. 74, s. 77.

gage her interest whether in possession or reversion, not only in lands (except in certain cases copyholds) and money subject to be invested in the purchase of lands, but also in the proceeds of land directed to be sold, to the exclusion of her equity to a settlement for her maintenance (*s*). The husband and wife, or the husband alone, may also (*t*) during the coverture dispose by sale or mortgage of the wife's term of years, whether legal or equitable, or whatever be the nature of her interest therein. The assignment of her legal interest in the term will, like a complete assurance of her real estate, be absolutely binding upon her; and even a voluntary assignment (apart from any question arising from actual fraud) so completely divests her right, that a subsequent mortgage after the death of her husband will not operate as a revocation under the statute 27 Eliz. c. 4 (*u*).

396. By statute (*x*), every married woman may by deed dispose of every future or reversionary interest, whether vested or contingent, of her, or her husband in her right, in any personal estate to which she shall be entitled under any instrument made after 31st December, 1857 (except a settlement or agreement for a settlement made on her marriage), and may release or extinguish any power vested in her in regard to any such personal estate, as effectually as she could do if she were a feme sole; and may extinguish her equity to a settlement out of any personal estate to which she or her husband in her right may be entitled in possession under any such instrument, the deed being made with the concurrence of the husband, and being acknowledged by the married woman in the manner required by the Fines and Recoveries Act (*y*). The act does not extend to reversionary interests which the married woman

(*s*) *Briggs v. Chamberlain*, 11 Hare, 69; 18 Jur. 56; on the authority of *May v. Roper*, 4 Sim. 360, before the act, and notwithstanding *Hoby v. Allen*, 15 Jur. 835; see *Williams v. Cooke*, 9 Jur., N. S. 658; 4 Gif. 343.

(*t*) *Bates v. Dandy*, 2 Atk. 207; 3 Russ. 72, n.; *Donne v. Hart*, 2 R. & M. 360; *Sir E. Turner's case*, 1 Vern. 7;

1 Ch. Ca. 307.

(*u*) *Hill v. Edmonds*, 5 De G. & S. 603; *Hatchell v. Egglex*, 1 Ir. Ch. R. 215; *Doe d. Richards v. Lewis*, 15 Jur. 512; 11 C. B. 1035.

(*x*) 20 & 21 Vict. c. 57 (1857, *Marlins' Act*).

(*y*) 3 & 4 Will. 4, c. 74. In Ireland 4 & 5 Will. 4, c. 92.

is restrained from alienating or affecting, nor to powers which are vested in her independently of the act.

397. Except under the operation of this act no disposition of the wife's choses in action, without or with her concurrence, will generally affect her title by survivorship after the death of her husband without having reduced the property into possession (*z*), or her statutory title as a feme sole where after the mortgage she has obtained a decree of judicial separation and is living apart from her husband (*a*), either as against the particular assignee of the fund or the assignee in bankruptcy of the husband: the result being the same, whether the husband had or had not the opportunity of reducing the fund into possession in his lifetime (*b*). And if the title of the wife surviving be for any reason doubtful, it will still prevail if by a decree in a suit affecting the property the fund have been ordered to be paid to her (*c*), or she have acquired a legal title (*d*); as by being executor of the person under whose will she is entitled to the fund.

A security which would be invalid under the general rule will not be made good because the original agreement for the loan was made by the wife before marriage (*e*); but her right will be barred if the chose in action was created for the sole purpose of the mortgage, and she never had any distinct interest in it otherwise than subject to the security (*f*).

398. Where the chose in action consists of a mortgage debt, the deposit by the husband of the deeds of the estate by way of equitable mortgage will not be a reduction of

(*z*) *Purdew v. Jackson*, 1 Russ. 1; 183.

Hornaby v. Lee, 2 Mad. 16; *Honner v. Morton*, 3 Russ. 65; *Wilkinson v. Charlesworth*, 10 Beav. 824.

(*a*) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; *Insole, Re*, L. R., 1 Eq. 470.

(*b*) *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Col. 553.

(*c*) *Hutchings v. Smith*, 9 Sim. 137.

(*d*) *Michelmores v. Mudge*, 2 Gif.

(*e*) *Prole v. Soady*, L. R., 3 Ch. 220. The mortgage by the husband of the wife's land tax, after he has been registered as husband under 38 Geo. 3, c. 60, s. 78, is binding to the extent of the security, but is no alienation of her interest as survivor beyond the amount of the mortgage debt. (*Id.*)

(*f*) *Winter v. Easum*, 2 De G., J. & S. 272.

the mortgage debt into possession: the possession of the deeds, either by the husband or the deposit, not being equivalent to, but only giving a right to obtain possession of the money (*g*).

399. But the equitable interest for life of the wife in real or personal estate is subject to her equity to a settlement as against the trustee in bankruptcy of her husband (*h*), because the trustee stands in the place of the husband and takes subject to his liability to maintain his wife. This rule has also been applied against the mortgagee of the wife's equitable absolute interest in a term of years (*i*), although the application of the doctrine under any circumstances to equitable interests in land appears to be inconsistent with the rule formerly observed, viz., that such interests were not subject to the same equity as personalty, because of their analogy to legal estates (*k*). The wife's equity, however, has been held not to be enforceable against a mortgagee of the husband's interest in the wife's land, where she is seized of the inheritance (*l*), nor against the assignee for value of her equitable life interest in real or personal estate, whether it be immediate or reversionary, where at the time of the assign-

(*g*) *Michelmores v. Mudge*, *supra*. If the assignment be made under the law of a foreign country, it will be treated, in the absence of evidence as to the husband's rights under that law, only as an assignment of the husband's chance of survivorship, and a stop order will be granted only during the husband's life. (*Moreau v. Polley*, 1 De G. & S. 143.)

(*h*) *Sturgis v. Champneys*, 5 M. & C. 97; *Barnes v. Robinson*, 9 Jur., N. S. 245.

(*i*) *Hanson v. Keating*, 4 Hare, 1.

(*k*) See 4 Hare, 8; Sir E. Turner's case, *supra*. It does not appear that Lord Hardwicke disapproved of this case, as Lord Cottenham seems to have inferred (5 M. & C. 107) from the report in 2 Atk. 421. In the report of *Bates v. Dandy*, 3 Russ. 72, n., Lord

Hardwicke speaks of Turner's case as accepted law and the foundation of many authorities.

(*l*) *Durham v. Crackles*, 8 Jur., N. S. 1174; see *Newenham v. Pemberton*, 17 L. J., N. S., Ch. 99. In *Duncombe v. Greenacre*, 28 Beav. 472; 29 id. 578; 7 Jur., N. S. 175, the wife was entitled to money charged on land, and secured by powers of entry, sale and mortgage; and which was assigned by the husband for valuable consideration. In a suit by the wife to have the charge raised, and for a settlement, an objection of the assignees to the payment of the fund into court by the owner of the estate, on the ground that the wife would then become entitled to a settlement, was overruled; and the fund having been paid in, the whole of it was afterwards settled.

ment the husband was willing and able to maintain her; and her equity cannot be revived by the husband's subsequent refusal or neglect to do so (*m*). And it cannot be claimed out of the past income of such property as against a mortgagee (*n*).

The wife may enforce her right to a settlement as well in a suit by herself as by the person claiming under the assignment or insolvency; and she is not deprived of it because she has the legal reversion, if an outstanding legal interest leaves her with a present right which is enforceable only in equity (*o*).

It has been held (*p*) that a mortgage without fine by husband and wife of her real estate for a term was established after the death of the husband by her acts, amounting to a re-delivery of the deed, and therefore to a new grant; she having given up possession and directed the tenants to attorn to the mortgagee and accounted to him as such. But the mere payment of interest by the widow has been held (*q*) not to set up such a mortgage, because the term ceased absolutely at the husband's death; though it was said that by acceptance of rent, if any had been reserved, the mortgage would have stood. These decisions can hardly be regarded otherwise than as contradictory. The principle of the latter is affirmed by a modern case in which a joint security, which was ineffectual by reason of the imperfect exercise of a power of appointment, was held not to bind the wife, though for many years after her husband's death she had paid interest upon it (*r*). The case of *Goodright v. Straphan* is supported by *Mr. Coventry (s)*, on the ground that the lease was voidable only and not void; but this is contrary to the express judgment of Lord Mansfield and of the whole Court of King's Bench.

(*m*) *Elliott v. Cordell*, 5 *Mad.* 149; *Stanton v. Hall*, 2 *R. & M.* 175; *Tidd v. Lister*, 3 *De G., M. & G.* 857; *Duffy's Trust*, *Re*, 28 *Beav.* 886; *Life Association of Scotland v. Siddal*, 3 *De G., F. & J.* 271.

(*n*) *Carr's Trusts*, *Re*, 12 *Eq.* 609.

(*o*) *Barnes v. Robinson*, 9 *Jur.*, *N. S.*

245; *Newenham v. Pemberton*, 17 *L. J.*, *N. S.*, *Ch.* 99.

(*p*) *Goodright d. Carter v. Straphan*, *Lloft*, 763; 1 *Dougl.* 58, *n.*; *Cowp.* 201.

(*q*) *Drybutter v. Bartholomew*, 2 *P. W.* 127.

(*r*) *Blandy v. Kimber*, 24 *Beav.* 148.

(*s*) *Pow. Mort.*, ed. 6, 721 *a*, *n.* (*q*).

A mortgage by husband and wife without fine was held to bind her after a joint answer by her and her husband in a foreclosure suit, the joint answer being considered to be equal to a fine (*t*).

400. Any property belonging to a married woman (married since the 9th August, 1870) for her separate use (*u*) (which includes property so settled without power of anticipation (*x*)) is liable to satisfy her debts contracted before marriage.

401. As to women previously married,—a married woman being entitled in equity to hold property for her separate use, may also contract debts to be paid out of it, either by a direct mortgage or charge upon the separate estate, or by a bond, promissory note, bill of exchange or written promise to pay the debt or demand, though not referring to her separate estate; because by this means only the obligation can be satisfied (*y*). And if the interest assigned be only equitable, the subsequent accession of the legal interest by the death of the husband will not defeat it, although the equitable separate estate which was the subject of the charge is at an end (*z*). The power of contracting a debt upon the credit of the separate estate is treated as incident to the ownership of the estate (*a*), and is not, as was formerly thought, exercised by way of equitable appointment under the settlement (*b*).

The written engagements of a married woman will also be covered by her testamentary charge of her debts on her estate (*c*).

The separate estate of a married woman is liable to debts, contracted on her verbal or general engagement, provided it appear that the engagement was made with reference to

(*t*) Anon. Mos. 248.

(*u*) Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93, ss. 12, 13.

(*x*) Sanger v. Sanger, L. R., 11 Eq. 470.

(*y*) Hulme v. Tenant, 1 Bro. C. C. 15; Heatley v. Thomas, 15 Ves. 596; Bullpin v. Clarke, 17 Ves. 365; Field v. Sowle, 4 Russ. 112; Stuart v. Lord

Kirkwall, 3 Mad. 387; Murray v. Barlee, 3 M. & K. 209; Greenough v. Sherlock, 10 L. T., N. S. 316.

(*z*) Major v. Lansley, 2 R. & M. 355.

(*a*) Owen v. Dickenson, Cr. & Ph. 48.

(*b*) Field v. Sowle, 4 Russ. 112.

(*c*) Owen v. Dickenson, supra.

and on the credit of the separate estate ; a fact which is to be judged of by the court according to the circumstances of the case, and may be considered to be implied where the married woman is living apart from her husband (*d*). The mere transaction of business relating to the separate estate, for the husband and wife, does not make it liable to the costs (*e*).

402. Where a married woman has a general power of appointment by deed or writing, the corpus of the property, subject to her right of mortgage or alienation, is liable (*f*) to all such debts or engagements as are chargeable on her separate estate ; because as to the property subject to the power, she is a feme sole.

Where the power can only be exercised by will, the exercise of it will not make the property liable to the debts of the married woman ; for neither by the power itself nor by the exercise of it does the property become her separate estate (*g*). Yet if she have been guilty of fraud in the contract, as by holding herself out as a single woman, the liability will attach (*h*).

403. To create an effectual charge upon the separate estate of a married woman, the obligation must be made under such circumstances, that it can only be satisfied by resorting to her separate estate, or she must have shown a clear intention to bind her interest. Her mere concurrence with her husband in a security, without any contract on her part, will not bind her separate estate if the terms of the deed are consistent with an intention that the husband's

(*d*) *Tullett v. Armstrong*, 4 Beav. 319; *Vaughan v. Vanderstegen*, 2 Dr. 165; *Johnson v. Gallagher*, 7 Jur., N. S. 273; 3 De G., F. & J. 515, per Turner, L. J.; *London Chartered Bank of Australia v. Lempriere*, L. R., 4 P. C. 572; see *Owen v. Dickenson*, and *Murray v. Barlee*, *supra*.

(*e*) *Callow v. Howle*, 1 De G. & S. 531.

(*f*) *Hulme v. Tenant*, 1 Bro. C. C. 15; *Field v. Sowle*, 4 Russ. 112; *Johnson v. Gallagher*; *London Chartered Bank of Australia v. Lempriere*, *supra*.

(*g*) *Vaughan v. Vanderstegen*, *supra*; *Blachford v. Woolley*, 9 Jur., N. S. 568; *Hobday v. Peters*, 28 Beav. 354; see *Hughes v. Wells*, 9 Hare, 749; and *Johnson v. Gallagher*, *supra*.

(*h*) *Vaughan v. Vanderstegen*, *supra*.

interest alone shall be bound (*i*); but if by mistake she should affect to appoint a larger interest than she has, the security will be good for her actual interest (*k*). And an assignment by her of property, to the income only of which she is entitled for her separate use, amounts to an assignment of her interest in the income (*l*).

404. An absolute gift to a married woman of real or personal estate producing income, may be qualified by a restraint upon sale or incumbrance or anticipation (*m*); though where separate estate is subjected to the appointment of the woman, with restraint on anticipation, and in default of appointment it is given for her separate use generally, the clause against anticipation applies only to the power, and not to the trust; and under the latter the estate may be assigned (*n*).

Of Securities upon the Property of Infants.

405. Where in a suit for the payment of debts, to which the heir or devisee of the deceased debtor may be liable, a court of equity shall decree the estates liable to the debts, to be sold or mortgaged for satisfaction thereof, the court may direct mortgages as well as sales to be made of the estates of the infant heir or devisee. And where hereditaments are devised in settlement by any person whose estate shall be liable for the payment of his debts, and by such devise shall be vested in any person or persons for life, or other limited interest, with any remainder, limitation or gift over which may not be vested, or may be vested in some person or persons from whom a conveyance or assurance cannot be obtained, or by way of executory devise, the court by which any such decree for payment of debts shall be made may direct mortgages as well as sales of the heredita-

(*i*) *Tullett v. Armstrong*, 4 Beav. 319.

(*k*) *Wainwright v. Hardisty*, 2 Beav. 363.

(*l*) *Crosby v. Church*, 3 Beav. 485.

(*m*) *Baggett v. Meux*, 1 Col. 138;

1 Ph. 627; *Ellis's Trusts*, Re, L. R., 17 Eq. 409.

(*n*) *Barrymore v. Ellis*, 8 Sim. 1; recognized in *Brown v. Bamford*, 11 Sim. 127; 1 Ph. 620; and *Vaughan v. Vanderstegen*, 2 Dr. 168.

ments so devised in settlement; and may authorize them in cases where the tenant for life, or other person having a limited interest, or the first executory devisee, is an infant. And the infant may be compelled to execute a conveyance. The surplus monies are declared to belong to the same persons who would have been owners of the hereditaments sold, if no sale or mortgage had been made (*o*).

The acts do not authorize the court to extend the sum directed by the decree to be raised by mortgage for payment of the debts, for the purpose of repairing the property proposed to be mortgaged, though it was said to be impossible otherwise to raise the money on the estate (*p*).

406. Where an infant has no other means of maintenance than the rents of real estate, which are insufficient, an order may also be made either in an action or on petition, that an allowance for maintenance shall be charged upon or ordered to be raised out of the corpus of the estate, or paid out of a fund in court representing the corpus (*q*).

Of Securities upon the Property of Lunatics.

407. By the Lunatics' Regulation Consolidation and Amendment Act (*r*), where it appears to the Lord Chancellor intrusted with the custody of lunatics (*s*) to be just and reasonable, or for the lunatic's benefit, he may order that any estate or interest of the lunatic in land or stock, either in possession, reversion, remainder, contingency or expectancy, be sold or charged by way of mortgage, or otherwise disposed of as may seem to him most expedient, for the purpose of raising money to be applied, and may accordingly order that the money when

(*o*) 11 Geo. 4 & 1 Will. 4, c. 47, ss. 11, 12, as amended and explained by 2 & 3 Vict. c. 60.

(*p*) *Hill v. Maurice*, 1 De G. & S. 214.

(*q*) *Fentiman v. Fentiman*, 13 Sim. 171; *Nottley v. Palmer*, 11 Jur., N. S. 968; and see *Allen, Re*, L. R., 8 Ch. 417, n.; *Howarth, Re*, id. 416.

(*r*) 16 & 17 Vict. c. 70, ss. 116—189. And see the interpretation clause. Lunacy Regulation (Ireland) Act, 1871, s. 63.

(*s*) This includes the Lords Justices of Appeal, and other judges intrusted with the care and commitment of the persons and estates of lunatics. (*Judicature Act*, 1875, s. 7.)

raised may be applied, for or towards all or any of the purposes following, viz.:—

1. The payment of the lunatic's debts or engagements;
2. The discharge of any incumbrance on his estates (*t*);
3. The payment of any debt or expenditure incurred or made after inquisition, or authorized by the Lord Chancellor so intrusted, to be incurred or made for the lunatic's maintenance, or otherwise for his benefit;
4. The payment of, or provision for, the expenses of his future maintenance;
5. The payment of the costs of applying for, obtaining and executing the inquiry, and of opposing the same;
6. The payment of the costs of any proceeding under or consequent on the inquisition, or incurred under order of the Lord Chancellor so intrusted: and,
7. The payment of the costs of any such sale, mortgage, charge or other disposition, as is by the act authorized to be made.

And the committee of the estate, in the name and on behalf of the lunatic, shall execute and do all such conveyances, deeds, transfers and things relative to any such mortgage or charge, and for effectuating the provisions of the act, as the Lord Chancellor (in lunacy) shall order. And every mortgage or other disposition made by virtue of the act is as valid as if the person in whose name or place, or on whose behalf the same was made, had been of sound mind and had made the same.

On a disposition of the real estate of a married woman under this act, the Lord Chancellor cannot confer upon the committee a statutory power under which the legal estate will pass, so as to dispense with an acknowledgment under the Fines and Recoveries Act. But the conveyance by the com-

(*t*) Where, in a partition suit, a conveyance of the lunatic's share had been made to her in tail, without providing for the costs which the decree had directed to be raised by mortgage, the Lords Justices refused to authorize the committee to raise them by mortgage;

but an indorsement on the partition deed of a declaration that the limitations were to be considered as subject in equity to a prior charge, for the costs originally ordered to be raised, was authorized by Stuart, V.-C. (*Bloomar, Re*, 2 De G., F. & J. 154.)

mittee under the order will bind the estate in the hands of the heir, so as to compel him to give effect to it by a valid conveyance (*u*).

408. Where a charge or mortgage is made under the act, upon an interest in contingency, reversion, remainder or expectancy, for the expenses of future maintenance, the Lord Chancellor (in lunacy) may direct the same to be paid either contingently, where the interest charged is contingent, or upon the happening of the event if the interest depend upon an event which must happen, and either in a gross sum or in annual or other periodical sums, and at such times, in such manner, and with or without interest, as he shall deem expedient; and any charge made before, and which would have been valid if made after the passing of the act, is declared to be valid (*x*).

409. Where it appears to the Lord Chancellor (in lunacy) to be for the lunatic's benefit, he may order that the whole or part of the monies expended, or to be expended under his order, for the permanent improvement, security or advantage of the land of the lunatic, or of any particular part thereof, shall with interest be a charge upon and be raisable out of the lunatic's estate and interest in the land, or such particular part thereof as aforesaid; but so that no right of sale or foreclosure during the lifetime of the lunatic be given or acquired under or by virtue of the charge, and the interest shall be kept down during the lunatic's life out of the income of his general estate, so far as the same shall be sufficient to bear it; and the committee of the estate shall in the name and on behalf of the lunatic execute all such conveyances for effectuating this provision as the Lord Chancellor (in lunacy) shall order: and such charge may be made either to some person advancing the money, or if the money is paid out of the lunatic's general property, to some person as a trustee for him, as part of his personal estate (*y*).

(*u*) *Stables, Re*, 10 Jur., N. S. 245.
(*x*) Sect. 117; Irish Act, s. 65 (1871).

(*y*) Sect. 118; Irish Act, s. 66 (1871).

410. On any monies being raised by sale, mortgage, charge or other disposition of land, made in pursuance of any of the foregoing provisions, the person whose estate is sold, mortgaged, charged or otherwise disposed of, and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus monies remaining, after the purposes for which the monies shall have been raised shall have been answered, as he or they would have had in the estate if no sale, mortgage, charge or other disposition thereof had been made; and the surplus monies shall be of the same nature and character as the estate sold, mortgaged, charged or otherwise disposed of; and the Lord Chancellor (in lunacy) may make such orders, and direct such conveyances, deeds and things to be, and the same shall be, executed and done, as may be necessary for effectuating this provision and for the due application of the surplus monies (z).

411. The Lunacy Regulation Act, 1862 (a), also provides, that for giving effect to any order made under the act for rendering the property of a person of unsound mind, not found so by inquisition, available for his maintenance or benefit, or for carrying on his business, the Lord Chancellor (in lunacy) may order any land, stock or other property of such person as aforesaid, to be sold, charged by way of mortgage or otherwise disposed of, and a conveyance, transfer or other disposition thereof to be executed or made by any person on the lunatic's behalf; and may order the proceeds of any such sale, charge or other disposition, or the dividends or income of such land, stock or property, to be paid to any relative of such insane person, or to such other person as it may be considered proper to trust with the application thereof, to be applied by him to the maintenance or for the benefit of the insane person, or of him and his family, either at the discretion of such relative or person, or in such manner and subject to such control and with or without such security for the application thereof, as the Lord Chancellor (in lunacy) may direct; and who for the

(z) Sect. 119; Irish Act, s. 67 (1871).

(a) 25 & 26 Vict. c. 86, s. 13.

purpose above mentioned shall have all the same powers with respect to the transfer, sale and disposition of and otherwise respecting the real and personal property of such person, as if he had been found lunatic by inquisition.

And for extending the powers over the property of lunatics given by the act of 16 & 17 Vict. c. 70, s. 116 (407), where it appears to the Lord Chancellor (in lunacy) to be for the lunatic's benefit, he may order any estate or interest of the lunatic in land or stock, either in possession, reversion, remainder, contingency or expectancy, and either existing or which may exist at any future time, to stand charged with any monies advanced or to be advanced, or due or to become due to any person for or in respect of any of the purposes or matters mentioned in the said section, and either with or without interest on such monies; and he may also order any such estate and interest to be dealt with and disposed of as he shall consider expedient for any of the purposes aforesaid, or for securing any monies advanced or to be advanced for such purposes or any of them, and with or without interest for the same; and every charge and disposition made by or in pursuance of any such order, shall take effect subject only to any prior charge to which the estate or interest affected thereby may at the date of such order be subject (*b*).

Of Securities by Bankruptcy Trustees.

412. The trustee of a bankrupt may, with the sanction of the committee of inspection, mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts (*c*).

Of Securities by Trustees and Executors.

413. Where by any will coming into operation after the 13th day of August, 1859, the testator shall have charged his real estate or any specific portion thereof with the pay-

(*b*) Sect. 16; Irish Act, s. 64 (1871).

(*c*) 32 & 33 Vict. c. 71, s. 27 (1)
(Bankruptcy Act, 1869); 35 & 36 Vict.

c. 58, s. 101 (1) (Bankruptcy (Ireland)
Amendment Act, 1872).

ment of his debts, or of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust (*d*), and for every person in whom the devised estate shall be vested by survivorship, descent or devise, or who may be appointed under any power in the will, or by the Court, to succeed to the trusteeship vested in such devisee or devisees in trust, and notwithstanding any trusts actually declared by the testator to raise such debts, legacy or money by a sale or mortgage of the said hereditaments or any part thereof, or partly in one mode and partly in the other, and in case of mortgage, reserving such rate of interest and fixing such period or periods of repayment as the person or persons executing the same shall think proper.

414. If any (*e*) testator, who shall have created such a charge as is described in sect. 14, shall not have devised the hereditaments charged so that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will, or in whom the executorship shall for the time being be vested, shall have the same or the like power of raising the said monies as is vested by the act in the devisee or devisees in trust. But any sale or mortgage under the act shall operate only on the estate and interest, whether legal or equitable, of the testator; and shall not render it unnecessary to get in any outstanding subsisting legal estate.

415. Purchasers (*f*) or mortgagees shall not be bound to inquire whether the powers conferred by any of the above provisions shall have been duly and correctly exercised by the person or persons acting in virtue thereof. Nor (*g*) shall the

(*d*) 22 & 23 Vict. c. 35, ss. 14, 15.

(*e*) Sect. 16.

(*f*) Sect. 17.

(*g*) Sect. 18.

said provisions prejudice or affect any sale or mortgage made in pursuance of any will coming into operation before the passing of the act, but the validity of any such sale or mortgage shall be ascertained and determined as if the act had not passed. The powers do not apply to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, and do not affect the power of any such devisee or devisees to sell or mortgage as he or they might have done before the passing of the act.

416. Independently of this act, where real estate is charged with payments, the mode of raising which is not prescribed, the executor or the devisee, when the estate is devised subject to the charge, may raise them by way of mortgage or of sale in exercise of the implied power which arises by force of the charge (*h*); but not so as to give the mortgagee a right to prove as a creditor against the estate (*i*). If the estate be charged generally with the payment of debts, or of debts and legacies, the charge amounts to a declaration that the persons responsible for payment of the debts are intrusted with the receipt and application of the money, and the mortgagee is free from obligation although there were no debts, or they were discharged at the time of the mortgage (*h*): the presumption being that the money is raised for the payment of the debts; and this presumption is not displaced merely by the circumstance that the executor and devisee of the estates charged has

(*h*) *Ball v. Harris*, 4 M. & C. 264; *Eland v. Eland*, id. 420; *Stroughill v. Anstey*, 1 De G., M. & G. 636; *Eidsforth v. Armstead*, 2 K. & J. 333; *Corser v. Cartwright*, L. R., 8 Ch. 971. As to the cases in which the implied power arises, id.; and *Storey v. Walsh*, 18 Beav. 559; *Wrigley v. Sykes*, 21 Beav. 337; *Colyer v. Finch*, 5 H. L. C. 922; *Hodkinson v. Quinn*, 1 J. & H. 303. See observations upon *Doe d. Jones v. Hughes* (6 Exch. 223), in *Robinson v. Lowater*, 17 Beav. 601. A decree for sale under an implied power to sell, for payment of debts, can only be ob-

tained in a creditor's suit. (*Bolton v. Stannard*, 27 L. J., N. S., Ch. 845.)

(*i*) *Farhall v. Farhall*, L. R., 7 Ch. 123.

(*h*) Per Lord St. Leonards in *Stronghill v. Anstey*, commenting upon *Johnson v. Kennett*, 6 Sim. 384; 3 M. & K. 624; *Page v. Adam*, 4 Beav. 269; *Forbes v. Peacock*, 11 Sim. 152; 1 Ph. 717; 11 M. & W. 639; *Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. 272; 18 Jur. 321, 363; *Bolton v. Stannard*, 4 Jur., N. S. 576; see *Cook v. Dawson*, 29 Beav. 123; 3 De G., F. & J. 127.

included in the security, property which formed no part of the testator's estate (*l*).

417. The mortgagee, making the advance *bonâ fide* under the belief that the money would be properly applied and without notice of an intended improper application, is justified in taking the word of the executor or trustee as to the necessity for raising it, where there are no circumstances which may create a reasonable doubt as to the motive or objects for doing so (*m*) (950). But where money is proposed to be raised after a considerable lapse of time, and without apparent reason, the mortgagee is bound to make proper inquiry (*n*). A mortgage made by a trustee, under colour of a charge, seventeen years after the death of the testatrix, and under circumstances which showed that the payment of her debts could not have been the whole object, was set aside as against the transferee. But a sale made twenty-seven years from the death, where there were no such circumstances, has been supported (*o*).

418. The simple contract debts of deceased debtors become by the effect of the statute (*p*), which makes the land assets for the payment of such debts, a general charge upon the land; and a purchaser from the heir or devisee, without notice that the sale is made for the purpose of defeating creditors, may assume that it is required for the due administration of the

(*l*) *Barrow v. Griffith*, 11 Jur., N. S. 6.

(*m*) *Hartland v. Murrell*, 27 Beav. 204; *Farhall v. Farhall*, L. R., 7 Eq. 286. The executor may borrow from a building society, notwithstanding the nature of the consequent arrangements. (*Cruikshank v. Duffin*, L. R., 13 Eq. 555.)

(*n*) *Stroughill v. Anstey*, *supra*; see *Colyer v. Finch*, *supra*.

(*o*) *Burt v. Trueman*, 6 Jur., N. S. 721; 29 L. J., N. S., Ch. 902; *Sabin v. Hoape*, 27 Beav. 553. Where a bill was filed by creditors, alleging only that the devisees in trust of real estates

charged with debts had mortgaged as beneficial owners, and that the money was not applied in payment of debts, a demurrer by the mortgagees was overruled. But *Turner*, L. J., dissented, on the ground that notice of the intended application of the money was not sufficiently imputed to the mortgagees by the bill, and that doubt ought not to be thrown upon the rights of such devisees to deal with their testator's estates. (*Collingwood v. Russell*, 10 Jur., N. S. 1062.)

(*p*) 3 & 4 Will. 4, c. 104.

estate, and is not bound to see to the application of the purchase-money (*q*).

419. Where there is an express direction to raise the charge, if the trusts of the will require that a gross sum should be raised, it may be raised out of the estate itself, although the rents and profits be the only specified fund (*r*); and upon this principle fines for the renewal of leases for lives, and upon taking admittance to copyholds, may be so raised (*s*). Where there is a power to raise fines out of *annual* rents and profits, with power to mortgage, in case the necessary sums shall not be provided in that manner, the fines will be payable out of the income, if it be sufficient (*t*). But where the power is simply to raise the fines out of the rents, or by mortgage, if the trustees refuse to exercise their discretion as to the mode of raising the money, the court, in pursuance of its general principles, will so raise it as to throw the burthen upon the parties in proportion to their interests in the property charged, although it seems the trustees, in the exercise of their power, might have made a different disposition (*u*).

420. Trustees are also authorized by statute (*x*), in case any money shall be required for the purpose of paying for equality of exchange, or for the renewal of any lease authorized by the act, if they shall not have in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or of which the lease is to be renewed, sufficient money for the purposes aforesaid, to raise the same by mortgage of the hereditaments to be received in exchange or contained in the renewed lease, or of any other hereditaments subject to the uses or trusts subsisting in the hereditaments taken in exchange, or comprised in the renewed lease, with the same powers of con-

(*q*) *Kinderley v. Jervis*, 22 Beav. 1.

(*r*) Per Lord Eldon in *Bootle v. Blundell*, 1 Mer. 233.

(*s*) *Allan v. Backhouse*, 2 V. & B. 65; *Jac.* 631; *Playters v. Abbott*, 2 M.

& K. 97; see *Garmstone v. Gaunt*, 9 Jur. 78.

(*t*) *Solley v. Wood*, 29 Beav. 482.

(*u*) *Jones v. Jones*, 5 Hare, 440; *Ainslie v. Harcourt*, 28 Beav. 313.

(*x*) 23 & 24 Vict. c. 145, s. 9.

veyance or assurance as are contained in the act with reference to a conveyance on sale; and no mortgagee advancing money on a mortgage purporting to be made under the power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

421. A power for trustees to mortgage is also sometimes implied in a power to sell (*y*), viz., where to satisfy the terms, or the proposed object of the power—as for instance, to raise a particular charge, subject to which the estate is devised—it is not necessary to make an absolute conversion. But a mortgage cannot be made under an absolute trust for sale, with power to buy in and resell, as may appear most beneficial (*z*). And if the raising of a charge by sale be forbidden, the prohibition extends also to the raising it by mortgage, which may cause the loss of the estate by sale or foreclosure (*a*).

422. Trustees who are empowered to raise money by mortgage for the payment of debts and legacies may raise it without first obtaining a decree (*b*): and a mortgage may be made where a term has been created for raising money out of rents and profits, or where there is a mere declaration that the estate is charged with payment of the money, though the trustees be directed to enter and receive it out of the rents (*c*); and notwithstanding the existence of a legal right to recover by entry or distress the arrears of an annuity or rent charged upon land, they may be directed to be raised by sale or mortgage where the estate and the burden of the charges are both in the same hand (*d*).

(*y*) *Mills v. Banks*, 3 P. W. 9; *Hal-denby v. Spofforth*, 1 Beav. 390; *Strong-hill v. Anstey*, 1 De G., M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Earl of Orford v. Albemarle*, 17 L. J., N. S., Ch. 396.

(*z*) *Devaynes v. Robinson*, 24 Beav. 86; 3 Jur., N. S. 1143.

(*a*) *Bennett v. Wyndham*, 23 Beav. 521; 3 Jur., N. S. 707, 1143.

(*b*) *Earl of Bath v. Earl of Bradford*, 2 Ves. 587.

(*c*) *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves., jun. 227; *Green v. Belcher*, 1 Atk. 505.

(*d*) *Cupit v. Jackson*, 18 Price, 721; *McCl. 495*; *Philipps v. Philipps*, 8 Beav. 198; *White v. James*, 26 id. 191; *Horton v. Hall*, L. R., 17 Eq. 437; *Taylor v. Taylor*, id. 324; *Hall v. Hurt*, 2 J. & H. 76.

423. Where the person who creates the security creates it under a trust or power, the question may arise whether, without special authority, he can insert in it a power of sale. It appears now to be settled that a personal representative mortgaging the leasehold of his testator or intestate (*e*), or a trustee with power to raise money by sale or mortgage of real or leasehold property, or by mortgage of chattel property, which from its nature can be dealt with only by bill of sale, or some kindred form of security, may add to the mortgage a power of sale (*f*), though it is not a breach of trust to omit to do so (*g*). Where there was a mere power to trustees to mortgage real estate, it was held that they could not give a power of sale; because a power to mortgage does not in general include a power to sell, and the donee of a power cannot confer a right which he does not possess (*h*). But in a case which appears to have related to real estate, an opinion was expressed by Lord Romilly, M. R., that the power to mortgage carries a right to insert all proper remedies including a power of sale, unless expressly excluded, on the ground of expediency, because the loan can be so raised on better terms; and that the power ought therefore to be inserted in mortgages by trustees. The like opinion was given in another case in words which appear to be generally applicable (*i*). Upon this principle authority has been given to insert the power in a mortgage of infants' real estate for the payment of debt and costs (*k*).

If property be bought subject to an agreement under which the vendor is bound to mortgage it to a third person, and afterwards the mortgage be made with a power of sale, the power will be good against the purchaser from the mortgagor, and he

(*e*) *Saunders v. Richards*, 2 Col. 568; *Cruikshank v. Duffin*, L. R., 13 Eq. 555.

(*f*) *Russell v. Plaice*, 18 Beav. 21; 18 Jur. 254; *Bridges v. Longman*, 24 Beav. 27; *Clarke v. Panopticon*, 3 Jur., N. S. 178; 4 Dr. 26.

(*g*) *Farrar v. Barraclough*, 2 Sm. & G. 231. And a solicitor is not liable for negligence if he omit to take it. (*Bailey v. Abraham*, 14 L. T. 219.)

(*h*) *Clarke v. Panopticon*, *supra*; see

Drake v. Whitmore, 5 De G. & S. 619.

(*i*) See *Bridges v. Longman*, *supra*; but the settlement contained a power to sell. *Cook v. Dawson*, 29 Beav. 128; 7 Jur., N. S. 130. And that in the case of an executor the objection arising from the delegation of a power does not apply. (See *Earl Vane v. Rigden*, L. R., 5 Ch. 663.)

(*k*) *Selby v. Cooling*, 23 Beav. 418; *Drake v. Avery*, cited there.

will be declared to be a trustee of the legal estate for the purchaser from the mortgagee under the power (*l*).

Where a conveyance, absolute in form, is ordered to stand only as a security for the sum found due, a power of sale is not considered to be imported into it (*m*).

424. The power which is vested in an executor or administrator, by virtue of his office, of raising money by sale of the leasehold and other personalty of the testator, for the purposes of the trust, also enables him to raise money by mortgage or pledge of the personalty, even though it be specifically bequeathed; and unless the transaction affords intrinsic evidence that the executor is not acting fairly in the execution of his duty (as where the consideration is the payment of a debt personally due from the executor to the mortgagee, or the latter has notice that it is borrowed in breach of trust for an intended misapplication) the mortgagee has a right to infer that the executor is so acting, and is not bound to inquire as to debts and legacies (*n*). The power of the executor in this respect corresponds with the power which arises to a trustee, where there is a charge of debts and legacies upon real estate (**416**). And it is not affected by a mere administration decree, if no receiver have been appointed nor any injunction granted to restrain him from dealing with the assets, notwithstanding the doctrine of *lis pendens* (*o*) (**184**).

425. A charge of debts upon real estate, contained in a will which also directs the executors to carry on the testator's business, does not authorize them to mortgage the real estate, which was not employed at his death in the business, for the payment of debts incurred in carrying it on under the will (*p*).

(*l*) *Leigh v. Lloyd*, 35 Beav. 455; 34 L. J., Ch. 646; 2 De G., J. & S. 330.

(*m*) *Pearson v. Benson*, 28 Beav. 598.

(*n*) *Mead v. Lord Orrery*, 3 Atk. 235; *Ewer v. Corbet*, 2 P. W. 148; *McLeod v. Drummond*, 17 Ves. 153; *Keane v. Roberts*, 4 Mad. 332; *Watkins v. Cheek*, 2 Sim. & St. 199; *Russell v. Plaice*, 18 Beav. 21; 18

Jur. 254; see *Taylor v. Hawkins*, 8 Ves. 209; *Haynes v. Forshaw*, 17 Jur. 930; 11 Hare, 93; *Braithwaite v. Britain*, 1 Keen, 206; *Collinson v. Lister*, 20 Beav. 356; 7 De G., M. & G. 634; *Doe d. Woodhead v. Fallows*, 2 C. & J. 481.

(*o*) *Berry v. Gibbons*, L. R., 8 Ch. 747.

(*p*) *McNeillie v. Acton*, 17 Jur. 1041; 4 De G., M. & G. 744.

426. Trustees who have power to raise a certain sum by mortgage for the benefit of certain persons, have an implied power to raise the incidental costs by mortgage of the same property (*q*).

427. Money properly expended by a tenant for life for the benefit of the inheritance of the settled estate, may under special circumstances be charged upon the estate. Such may be the expenses of substantial repairs to, or completing, or even (in a case of necessity) of rebuilding, the mansion house (*r*).

(*q*) *Armstrong v. Armstrong*, L. R., 18 Eq. 541.

(*r*) *Hibbert v. Cooke*, 1 Sim. & S. 552; and *Graves v. Graves*, cited there; *Frith v. Cameron*, L. R., 12 Eq. 169. In *Dent v. Dent*, the expenses of completing the house were sought to be repaid out of the personalty, but would probably have been charged on the estate, if necessary. (30 Beav. 363; 31 L. J., Ch. 436.)

The rules as to the investment of trust money upon mortgage belong rather to the law of trusts than of mortgages; but it may be convenient to state them here shortly.

Trustees, executors or administrators, where not expressly forbidden to do so, may now invest trust funds upon real security in any part of the United Kingdom, without being liable for breach of trust, provided the investment be in other respects reasonable and proper (22 & 23 Vict. c. 35, s. 32, made retrospective by 23 & 24 Vict. c. 38, s. 12); and trustees who are empowered to invest upon mortgage of land in "England, Wales or Great Britain," may also, unless expressly forbidden to do so, invest upon land in Ireland (4 & 5 Will. 4, c. 29), the securities being enforceable by courts of equity in England. And, where authorized to invest in the mortgages or bonds of a railway or other company, may, unless expressly forbidden, invest in the debenture stock, by means of which such

company is empowered to raise the money which it may raise on mortgage or bond. (The Debenture Stock Act, 1871, 34 Vict. c. 27.) But the Court of Chancery, although not holding a trustee liable for breach of trust, who either under statutory or other power has made such an investment with due precaution, will not, except under special circumstances, authorize the investment upon real security of the money of infants (*Norbury v. Norbury*, 4 Mad. 191; *Ridgways, Re*, 1 Hog. 309), or of lunatics; except under special circumstances; as where the lunatic has an interest in the property, and it will be beneficial to relieve the family estate. (*Cathorpe, Exp.*, 1 Cox, 182; *Ellice, Exp.*, Jac. 284; *Johnson, Exp.*, 1 Mol. 128.) The same rule is applied generally to trust funds under the control of the court. (See *Baud v. Fardell*, 7 De G., M. & G. 633.) It seems that notwithstanding the statutory power the court will not advise trustees to lay out money upon mortgage of land in Scotland (*Miles, Re*, 27 Beav. 579), nor accede to an Irish mortgage under the act of 4 & 5 Will. 4. (*Stuart v. Stuart*, 8 Beav. 430.)

By 33 & 34 Vict. c. 34, s. 1, all corporations and trustees in the united kingdom, holding monies in trust for any public or charitable purpose, may invest such monies on any real security (which includes legal and equitable mortgages and charges upon lands or

Of Securities by Agents—Factors.

428. An implied power to mortgage or pledge is sometimes vested in persons as agents over property of which they have only a temporary control without any right of property. As a general rule, the control which an agent has over his principal's property does not authorize him to pledge it. It is therefore laid down (s) that a solicitor cannot without authority, express or to be implied from strong circumstances, either pledge his client's deeds or do anything to prejudice his estate or interest under them. Exceptions to the general rule have arisen from necessity, and by the custom of trade, and have in some cases been authorized and regulated by statutes. One notable exception, founded upon necessity only, is the power to hypothecate the ship which is vested in the master, and this has already been considered under the head of bottomry, which is the only form in which the power can be exercised (117); the master being unable, without special authority, to mortgage or pledge the

hereditaments of any tenure or upon any estate or interest therein, or any charge or incumbrance thereon) authorized by, or consistent with, the trusts on which such monies are held, without being deemed thereby to have acquired or become possessed of land within the meaning of the mortmain laws; or of any prohibition or restraint against the holding of land in any charter or act of parliament; and no contract for or conveyance of any interest in land, made *bonâ fide* for the purpose only of such security, shall be deemed void, by reason of non-compliance with 9 Geo. 2, c. 36 (855).

A mortgage within a power by which trustees are authorized to invest upon mortgage, ought it seems to be one under which they will have a remedy by ejectment; they are not justified in taking a second mortgage. (See *Norris v. Wright*, 14 Beav. 291; *Drosier v. Brereton*, 15 id. 221; *Mortimore v. Mortimore*, 4 De G. & J. 472.) And they must be careful that the security be of sufficient value; in which respect

it is understood that they will neglect their duty if they lend more than two-thirds of the value of freehold agricultural land, or one-half of the value of freehold houses; and even this it seems is too large a proportion if the property be used for trade purposes. (*Stickney v. Sewell*, 1 M. & C. 8; *McLeod v. Annesley*, 16 Beav. 600; *Farrar v. Barraclough*, 2 Sm. & G. 234; *Phillipson v. Gatty*, 7 Hare, 516; *Stretton v. Ashmall*, 3 Dr. 9.) If the property consist of renewable leaseholds, subject to a heavy rent, although it may be treated as freehold, yet as the rent must be paid whatever the variation in the value of the property, the advance ought not to be on a higher scale than upon freehold houses. (*McLeod v. Annesley*, *supra*.) In the case of ground rents, the court does not look only at the rents, but also at the buildings which are liable for the payment of them. (*Vickery v. Evans*, 10 Jur., N. S. 30.)

(s) Per *Turner, L. J.*, in *Cory v. Eyre*, 1 De G., J. & S. 168.

freight of the ship or cargo in any other way, or to direct payment of the freight to any other person than the ship-owner (*t*). Some other exceptions to the general rule will now be examined.

429. Before the passing of certain acts of parliament known as the Factors Acts, the law was that although a consignee, factor or other agent, intrusted with the possession of goods for the purpose of sale, might, to the extent and with notice of his own lien, give security by delivering them to another to hold for him in his name and as a continuance of his own possession (*u*); yet a tortious pledge by the factor was of no avail against the true owner of the goods: upon the principle that he who gives credit to another must be vigilant in ascertaining his debtor's right to pledge (*v*). The owner, therefore, upon tender of what was due to the factor could recover the proceeds of the sale of the goods from the pawnee, without regard (*x*) to the advances made by the latter to the factor; and the delivery of the goods or bill of lading by the broker for the purpose of sale, to a third person, who made advances in anticipation of the sale, was treated as a pledging of the goods; though the possession so given, being in accordance with the object of the original consignor, was legal (*y*). Nor was an authority to pledge considered to be implied (*z*) by a direction to the factor to deal with the goods at his discretion; or by reason that the principal drew against the factor, or requested him to make remittances in anticipation of the sales: nor was it given by a direct authority to sell, assign and transfer (*a*).

430. The first of the Factors Acts (*b*) legalized pledges by consignees of goods, or the bills of lading thereof, but limited the interest of the pledgee to the amount of that possessed by the pledgor at the time of the deposit or pledge. It also gave

(*t*) Sir Henry Webb, 13 Jur. 639; Kuckein v. Wilson, 4 B. & Al. 443; Reynolds v. Jex, 7 B. & S. 86. Martini v. Coles, 1 M. & S. 140.

(*u*) M'Combie v. Davies, 7 East, 5.

(*v*) Paterson v. Tash, Str. 1178; 2 Stark. 21; Queiroz v. Trueman, supra.

Queiroz v. Trueman, 3 B. & C. 342.

(*x*) Daubigny v. Duval, 5 T. R. 604.

(*y*) Newsom v. Thornton, 6 East, 17;

(*a*) De Bouchont v. Goldsmid, 5 Ves. 210.

(*b*) 4 Geo. 4, c. 83, s. 2.

express power (c) to the owner of the goods to recover them from the factor or his assignees in bankruptcy before the pledge; and to recover them after the pledge from any person, on repayment of the money or restoration of the negotiable security, or its value, for which such person might have a lien; and also to recover the balance of the proceeds of sale after deducting the sum advanced. And in case of the bankruptcy of the factor, it was declared that the debt due from the owner of the goods pledged, to the bankrupt's estate, should be considered as discharged *pro tanto*.

431. By another act (d), persons intrusted with and in possession of bills of lading and other specified documents of title to goods, were to be considered as the true owners of the goods described in the documents, so far as to give validity to any contract or agreement by them for the sale or disposition of such goods, or the deposit or pledge thereof (e) as security for money or negotiable securities advanced on the faith of the documents by any person not having notice that the pledgor was not the actual and *bonâ fide* owner. But where (f) the security was taken for an antecedent debt, or where, under the permission given by the act, it was taken with notice that the pledgor was but a factor or agent, no further right could be acquired than was possessed by the pledgor at the date of the pledge. This, like the former act, provided (g) for the recovery of the goods by the owner both before and after the pledge, and of the balance of the proceeds of sale, and for the discharge *pro tanto* of the debt to the factor's estate in the event of his bankruptcy. And it declared (h) the pledge of goods or documents by the factor, and the appropriation of the consideration to his own use, in violation of good faith and with intent to defraud, to be a misdemeanor. But it provided, that there should be no prosecution where the pledge was not for a greater sum than

(c) Sect. 3.

(f) 6 Geo. 4, c. 94, ss. 3, 5.

(d) 6 Geo. 4, c. 94, s. 2.

(g) Sect. 6.

(e) See *Taylor v. Kymer*, 3 B. & Ad. 320.

(h) Sects. 7, 8.

at the time of the pledge was due to the principal; and the acceptance of bills drawn by or on account of the principal, was not to constitute a debt from the principal so as to excuse the pledge, unless the bills were paid when they became due.

432. It will be observed, that this statute only applied to documents of title to goods, not to the goods themselves, and to pledges of such documents only as the owner had intrusted to the factor, not to those created by the factor himself; such as wharfingers' receipts and dock warrants obtained by the factor in his own name, upon landing goods consigned to him for sale (*i*). It also gave validity (*h*) to sales by known agents, made in the usual course of business, and without notice that the agent had no authority to sell. And by a third act (*l*), which recited an intention to put pledges by agents upon the same footing as such sales, it was declared that any agent who should thereafter be intrusted with the possession of goods (*m*), or of the documents of title to goods, should be taken to be the owner so far as to give validity to any bonâ fide contract by way of pledge, lien or security, as well for original as for further advances; and that such security should be binding on owners, though the person claiming the pledge or lien might have had notice of the agency. The agent must be intrusted at the time of the pledge. If at that time his authority was revoked, so that he is a wrongdoer, the pledge is not protected (*n*).

433. The statute of 6 Geo. 4 did not apply where the pledgor obtained the goods in his own right as a purchaser (*o*), or not in the character of a factor; as, for instance, in the character of a wharfinger (*p*), as distinguished from that of a person who carries on the business of buying and selling

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| (i) <i>Close v. Holmes</i> , 2 Moo. & R. 22. | Exch. 175.) |
| (h) 6 Geo. 4, c. 94, s. 4. | (n) <i>Fuentes v. Montis</i> , L. R., 3 C. P. 268; 4 id. 93. |
| (l) 5 & 6 Vict. c. 39, s. 1. | (o) <i>Jenkins v. Usborne</i> , 7 Man. & G. 678; 8 Sc. N. R. 505. |
| (m) The word "goods" does not include certificates of railway stock. (<i>Freeman v. Appleyard</i> , 32 L. J., N. S., | (p) <i>Monk v. Whittenbury</i> , 2 B. & Ad. 484. |

goods on account of others (*q*). Under the statute of Victoria, it is sufficient if the person intrusted be employed to sell the goods as an agent, in the manner in which sales of such goods are commonly carried on, although such be not his ordinary employment (*r*). But the transaction is not protected if the goods were received in another character than that of factor, and not for sale, although that business may also have been carried on by the pledgor, (*s*); and both statutes, notwithstanding the generality of the statute of Victoria, as to agency, relate only to mercantile transactions, and do not enable a servant intrusted with chattels to effect a good security upon them, or otherwise apply to the relation of master and servant (*t*). Contracts for pledge, lien or security, in consideration of delivery or transfer to the agent of any other goods or documents of title or negotiable security, upon which the person delivering them up had then a valid and available lien or security for a previous advance by virtue of a bonâ fide contract with such agent, are contracts within the meaning of the act of Victoria, and as valid as if the consideration had been for a present bonâ fide advance of money (*u*): provided that the lien acquired upon the goods or documents deposited in exchange does not exceed the value at the time of the property delivered up and exchanged.

It seems that, under the statute of Victoria, the person in possession is deemed to be intrusted within the meaning of the acts, in default of evidence to the contrary (*x*).

Under the act of Geo. 4, a factor, who had already made a pledge for an advance, could not withdraw it and substitute the warrant of his principal; because, there being no advance on the faith of the warrant, the exchange of other warrants, on the security of which an advance had been previously made, was considered to be tortious (*y*).

(*q*) *Baines v. Swainson*, 32 L. J., 191; *Lamb v. Attenborough*, 8 Jur., N. S., Q. B. 281; 4 B. & S. 270. N. S. 280; 1 B. & S. 831.

(*r*) *Heyman v. Flewker*, 13 C. B., (u) 5 & 6 Vict. c. 39, s. 2. N. S. 519; 9 Jur., N. S. 895.

(*s*) *Cole v. North Western Bank*, (x) Per Blackburn, J., *Cole v. North Western Bank*, supra.

L. R., 9 C. P. 470; 10 id. 354. (y) *Bonzi v. Stewart*, 4 Man. & G.

(*t*) *Wood v. Rowcliffe*, 6 Hare, 183, 296; 5 Sc. N. R. 1.

434. It seems that where one has made a pledge on the guarantee of another for payment of a debt, and the guarantor afterwards becomes intrusted with goods within the meaning of the act of Victoria, he can substitute those goods in lieu of the original pledge of the person for whom he was guarantor (*z*). A guarantee by an agent is equivalent to a contract within the meaning of the act, and the fact that the goods delivered in exchange were not the goods of or delivered by the original pledgor does not take the case out of the statute.

435. Under the act of Victoria (*a*), the pledge must be for an actual advance, and is not protected if the object be to take up a bill given to secure an antecedent debt (*b*). The statute only protects loans, advances and exchanges made *bonâ fide* by the person who contracts with the agent and without notice that the agent has no authority to contract, or is acting *malâ fide* against the owner. If there be no such notice the principal, who has intrusted the agent with documents which enabled him to deal with them or the goods fraudulently, will be bound (*c*). And the circumstances, a knowledge of which will constitute notice of want of authority or *mala fides*, must be such that the fact would be inferred by a reasonable man of business, who has applied his understanding to the matter (*d*). But mere suspicion will not affect the transaction. The question of *mala fides* is for the jury, and the facts of want of good faith, of want of authority and of notice, should be found by them categorically (*e*).

436. Notice that the factor holds the goods for sale, is not notice of *mala fides* in the pledge under this statute, unless there was notice that he was prohibited from pledging; nor

(*z*) *Sheppard v. Union Bank of London*, 8 Jur., N. S. 265; 7 H. & N. 661.

(*a*) 5 & 6 Vict. c. 39, s. 3.

(*b*) *Macnee v. Gorst*, L. R., 4 Eq. 315; and see *Jewan v. Whitworth*, *id.*, 2 Eq. 692.

(*c*) *Vickers v. Hertz*, L. R., 2 Sc.

App. 113.

(*d*) *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441; *Gobind Chunder Sein v. Ryan*, 9 Moo., Ind. App. 140; 8 Jur., N. S. 343.

(*e*) *Id.*; *Douglas v. Ewing*, 6 Ir. C. L. R. 395.

is it material that the agent intrusted with the goods obtained them by fraud from the owner, or that the advances on them were not made in the usual course of business (*f*). The statute assumes that the advances were so made. But if the consignee obtain a loan to enable him to pay a debt to which he and the lender were jointly liable, and pledge the goods to the latter as security; this being no real loan, but only a contrivance to pay the debt, is not protected by the statute (*g*).

437. A lien or pledge for a debt already due from the agent to the holder of the lien or pledge is not protected; nor is the agent authorized to deviate from the express orders or authority of the owner (*h*).

438. The expression "documents of title" includes (*i*) bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for delivery of goods, or any other document used in the course of business as proof of the possession or control of goods, or authorizing by indorsement or delivery the possessor of the document to transfer or receive goods thereby represented.

439. Any agent intrusted as aforesaid and possessed of any documents of title, whether derived immediately from the owner of the goods, or obtained by reason of the agent having been intrusted with the possession of goods, or of any document of title thereto, is "intrusted" with the possession of the goods represented by the document of title (*h*); a provision in which the word "intrusted" has a much larger meaning than in the act of 6 Geo. 4, under which it was necessary to show, not only that the owner intended the factor to

(*f*) *Navulshaw v. Brownrigg*, 1 Sim., N. S. 573; 2 De G., M. & G. 441; 16 Jur. 979; *Sheppard v. Union Bank of London*, 8 Jur., N. S. 265; 7 H. & N. 661.

(*g*) *Learoyd v. Robinson*, 12 M. & W. 745.

(*h*) 5 & 6 Vict. c. 39, s. 3.

(*i*) Sect. 4.

(*h*) *Ibid.* It is immaterial whether specified goods, or only goods answering a specified description, are referred to in the document of title; so many tons of a certain description of iron being, when dealt with, as much within the act as if particular iron had been specified. (*Vickers v. Hertz*, L. R., 2 Sc. App. 113.)

have possession at the time of the pledge, but that he should have it under such circumstances that an actual trust could be inferred; so that possession of a dock warrant obtained by the factor, without the knowledge and against the intention of the owner, would not support a pledge effected by means of such possession (*l*). All contracts, pledging or giving a lien upon such documents of title, are deemed to be pledges of and liens upon the goods to which the same relate; and the agent is "possessed" of such goods or documents, whether the same shall be in his actual custody, or held by any other person subject to his control, or for him or on his behalf (*m*). So that if a factor pledge goods for less than their value, they are considered to be held for him by the pledgee, to the extent of the unexhausted value, so as to enable him to re-pledge them or the balance of the proceeds arising from their sale (*n*). Where any loan or advance shall be *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing to consign, transfer or deliver such goods or documents, and the same shall actually be received by the person making such loan or advance, without notice that the agent was not authorized to make such pledge or security, every such loan or advance is deemed to be made on the security of such goods or documents within the meaning of the act, though such goods or documents shall not actually be received by the person making such loan or advance till a period subsequent thereto; and any contract or agreement, whether made direct with such agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money, bills of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the act.

The agent in possession is also considered to be intrusted with goods, unless the contrary be shown in evidence (*o*).

(*l*) *Phillips v. Huth*, 6 M. & W. 572; *Hatfield v. Phillips*, 9 M. & W. 647; 14 id. 665; 12 Cl. & F. 343.

(*m*) Sect. 4.

(*n*) *Portalis v. Tetley*, L. R., 5 Eq. 140.

(*o*) Sect. 4.

440. The civil responsibility of the agent, for breach of duty in respect of any contract, agreement, loan or pledge, is not affected by the act of Victoria (*p*). The misdemeanor clause of this act has been repealed, and more fully re-enacted (*q*); with a provision, which was also contained in the act of 5 & 6 Victoria (*r*), that the clause shall not apply in case the goods or documents of title shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of the consignment, deposit, transfer or delivery, was justly due to the agent from his principal, together with the amount of any bills of exchange drawn by or on account of the principal and accepted by the factor or agent. The payment of the bills is not made necessary.

441. The owner may redeem before sale (*s*), on re-payment of the lien or restoration of the security and re-payment of the agent's lien; or may recover the balance of the produce of the sale of the goods from the pledgee or owner of the lien, after deducting the amount of the lien. And in case of the bankruptcy of the agent, the owner of the goods redeemed is held (*t*), as to the sum paid on account of the agent for redemption, to have paid it for the use of the agent before the bankruptcy. Or, if the goods shall not be redeemed, the owner shall be deemed to be a creditor of the agent for the value of the goods pledged at the time of the pledge; and may prove for or set off the sum paid, or the value of the goods, as the case may be.

Of Securities by Bankers and Bill brokers.

442. Bankers, to whom negotiable securities are intrusted by their customers for the purpose of receiving the proceeds, can make a good pledge as against the customer to a person taking honestly (*u*). The security will, of course, be invalid

(*p*) Sect. 5.

(*q*) 24 & 25 Vict. c. 95, and c. 96,
s. 78.

(*r*) 5 & 6 Vict. c. 39, s. 6.

(*s*) Sect. 7.

(*t*) Ibid.

(*u*) *Collins v. Martin*, 1 Bos. & P. 648; 2 Esp. 520; *Pease, Exp.*, 19 Ves. 25; 1 Rose, 232, 243, 254. The bond of a foreign prince, payable to the

if the pledgee have notice of the want of authority, and such notice is sufficiently conveyed by a special indorsement on the bill for the account of the principal (*x*); nor can the banker give a good title against the owner to securities which are not negotiable (*y*).

443. A *bonâ fide* advance to a bill broker, on the deposit of bills, will also confer a good title, where the pledgee has no notice that they were held merely for the purpose of discount. But no such right will be conferred where the bills are deposited to secure money already due from the broker. The bill broker, in the absence of evidence as to the nature of his employment, is considered as an agent for procuring a loan of money on each bill separately; and according to the general law he has no right to risk the detention of the bill of one customer for losses arising from the dishonoured bills of another, by mixing the bills and pledging the mass for an entire sum. But where a custom so to mix and pledge the bills is proved to exist (as it does in London), it is upheld, and the pledgee is considered to be safe if he have honestly taken the bills for value in the course of business, though without any special precaution (*z*).

Of Securities by Partners.

444. Any one of several partners, or persons associated as partners in a particular transaction, may pledge or make a security affecting the personal property of the partners, for a loan or debt contracted for the ordinary purposes of the undertaking, where there is no notice of fraud or want of authority (*a*). And this power continues after the dissolution of the partnership for the purposes of winding up the affairs and of

holder for the time being, and proved to be negotiable like an exchequer bill, falls within the rule as to negotiable securities. (*Gorgier v. Mievill*, 3 B. & C. 45.)

(*x*) *Trentell v. Barandon*, 8 Taunt. 100.

(*y*) *Glyn v. Baker*, 13 East, 509.

(*z*) *Haynes v. Foster*, 2 Cr. & M.

237; 4 Tyr. 65; *Foster v. Pearson*, 1 C. M. & R. 849; 5 Tyr. 255.

(*a*) *Raba v. Ryland*, Gow, 132; *Tupper v. Haythorne*, cited 135, *id. n.*; *Bonbonus, Exp.*, 8 Ves. 540; *Reid v. Hollinshead*, 4 B. & C. 867; *Ridley v. Taylor*, 13 East, 175; *Bosanquet, Exp.*, De G. 432; *Howden, Exp.*, 2 M., D. & De G. 574.

contracts entered into during its continuance (*b*). But the partnership will not be bound by a security given by one of the firm to a person who knowingly makes advances for extraordinary purposes; such as raising additional capital for payment of the share of a deceased partner, or making new arrangements for carrying on the business (*c*). Nor, *à fortiori*, can one member of a firm bind the others by a security for the payment of his separate debt, unless the creditor can prove a direct assent by the other partners, or circumstances from which such assent may reasonably be inferred. The presumption is, that such a security was known by the creditor to have been given without the authority of the firm, and he takes the onus of proving the authority (*d*); and if such a security be made by a partner knowing that his firm is insolvent, it is a fraud upon the creditors of the firm and an act of bankruptcy (*e*).

445. If one of several partners give separate security for advances to himself, the security will cover advances on account of the firm, if it can be shown that the original pledge was made to secure a partnership debt (*f*). But where the security clearly relates to a separate debt, the mere existence of partnership dealings in connection with the money raised, without evidence to connect the security with such dealings, will not entitle the creditor to retain the security for money due from the partnership; and it makes no difference that the property which formed the separate security has afterwards become vested in the firm (*g*).

Upon the death of a partner, whose separate property is

(*b*) *Butchart v. Dresser*, 10 Hare, 453; 4 De G., M. & G. 542.

(*c*) *Fisher v. Taylor*, 2 Hare, 219.

(*d*) *Snaith v. Burridge*, 4 Taunt. 684; *Thorpe, Exp.*, 2 Deac. 16; *Frankland v. M'Gusty*, 1 Knapp, P. C. 274; *Levieson v. Lane*, 9 Jur., N. S. 670; 13 C. B., N. S. 278, notwithstanding the dictum of Lord Ellenborough in *Ridley v. Taylor*, *supra*. But the partner who has improperly made the pledge cannot take advantage of his want of power and repudiate his own act. (*Brownrigg*

v. Rae, 5 Exch. 489; see *Gordon v. Ellis*, 7 Man. & G. 607; *Hawker v. Hellowell*, 3 Sm. & G. 194.)

(*e*) *Snowball, Exp.*, L. R., 7 Ch. 542.

(*f*) *Chuck v. Freen*, 1 Moo. & Malk. 259, notwithstanding *Freen, Exp.*, 2 Gl. & J. 246, where the Vice-Chancellor refused to admit evidence of the parol arrangements.

(*g*) *M'Kenna, Exp.*, *The City Bank Case*, 3 De G., F. & J. 629; 7 Jur., N. S. 588.

liable for a partnership debt, the dissolution of the partnership prevents the continuance of the security for further advances; and if the dealings continue with the surviving partners, any subsequent payments to the creditor will go in discharge of the part of the original debt which was due from the deceased partner (*h*).

446. There appears to be no express authority as to the right of a partner to create an equitable security on the real estate of the firm. Such property for most purposes is personalty as between the partners and their representatives; but the remark of Lord Kenyon (*i*), that if a firm could be bound (which he held it could not) by the deed of one of the partners unauthorized by the others, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners, shows that no such security can be given.

447. The benefit of a security to a partnership belongs originally only to those partners who were members of the firm when it was given (*k*), but may be extended to the members for the time being on a verbal or other express or constructive agreement, or on evidence of intention that future partners should share the benefit of it (*l*). The security of a legal mortgage to three partners was thus extended to advances made by either of them, or by them and a fourth partner, on the authority of a letter, addressed to the firm after the fourth partner became a member, authorizing them to hold the securities in their hands to cover advances made or to be made to the mortgagor (*m*). And where a deposit was made to secure future advances, and there was an account current by reason of which

(*h*) *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214. As to the right of the solvent partner to deal with the partnership property after the bankruptcy of one partner *bonâ fide* and in the ordinary way of business, see *Lindley on Partnership*, vol. 2, 1177, ed. 3; *Buckley v. Barber*, 6 Ex. 164.

(*i*) *Harrison v. Jackson*, 7 T. R. 207.

(*k*) *Kensington, Exp.*, 2 Ves. & B. 80; *Eyton v. Knight*, 2 Jur. 8.

(*l*) *Marsh, Exp.*, 2 Rose, 289; *Lloyd, Exp.*, 1 Gl. & J. 389; *Ford, Exp.*, 3 M., D. & De G. 457.

(*m*) *Parr, Exp.*, 4 Dea. & Ch. 426.

the actual debt arose after a change in the creditor's firm, the mere leaving the deeds in the custody of the firm, was held to operate as a fresh deposit or tacit recognition of the debt; and as evidence of an intention to continue the dealings on the same terms as before the change (*n*).

448. One part-owner of a ship, even where he fills the office of ship's husband, has no authority to pledge the freight as against the other part-owners (*o*), though, subject to their rights and to the rights of creditors upon the ship, each part-owner may of course pledge his own share.

(*n*) *Oakes, Exp.*, 2 M., D. & De G.
234; *Smith, Exp.*, id. 314.

(*o*) *Guion v. Trask*, 1 De G., F. & J.
373.

CHAPTER IV.

OF THE RIGHT OF THE CREDITOR TO PROTECT THE SECURITY AND TO THE BENEFIT OF ACCRETIONS THERETO; AND OF THE CUSTODY AND PRODUCTION OF THE DOCUMENTS OF TITLE.

449. *Of the Protection of the Security and of Accretions thereto.*

458. *Of the Custody and Production of the Title Deeds.*

449. FROM the time of lending his money, the mortgagee, whether he be in or out of possession, acquires certain rights, both as regards the estate itself, and his title to it; by virtue of which, the latter, such as it may be, and so far as it depends upon his possession of the deeds, or other indicia of title, is secured against the interference of any adverse claimant; and the former is preserved from deterioration in the hands of the mortgagor, or of any other person to whose rights those of the mortgagee are superior.

450. *First*, as regards the estate: the mortgagee may not only at all times restrain such acts as the mining under buildings, so as to endanger their stability (*a*); but if he show that the security is insufficient (that is, it seems, that the act complained of will not merely reduce its value below the actual amount of the debt, but will substantially impair the value which was the basis of the original contract), he may, whether his security be in fee or for a term, restrain acts which lessen its value, such as the removal of valuable fixtures (*b*), or the

(*a*) *Dugdale v. Robertson*, 3 Jur., N. S. 687; 3 K. & J. 695.

(*b*) *Ackroyd v. Mitchell*, 3 L. T., N. S. 236.

cutting of timber (*c*), and even the cutting of underwood at unseasonable times, or such as is of improper growth for cutting (*d*); but as underwood is treated as the ordinary fruit of the land, the cutting of it by the mortgagor, though insolvent, and even though it be expressly included in the security, will not be prevented if it be done at seasonable times and in a husbandlike manner; except, it seems, where the mortgagor has been made a bankrupt, in which case it was prevented by Lord Eldon, on the ground that the mortgagee's right was to have the estate left as it was at the date of the bankruptcy, and to prove for the rest of the debt (*e*); though he afterwards gave the reason that it was in the interval between the bankruptcy and the appointment of assignees, when there was no one to exercise a control over the property (*f*). Relief has been refused to a judgment creditor under the old law, suing the debtor's heir at law, by whom a satisfied mortgage term and alleged fraudulent conveyance by the debtor were set up, on the ground that the plaintiff might have no interest in the property (*g*).

451. It is provided by the Lands Clauses Consolidation Act (*h*), that if the promoters of the undertaking shall be desirous of entering upon and using any lands to be taken by them under the act, before any agreement, award or verdict as to the purchase-money or compensation, they may enter upon and use the lands, upon depositing in the bank the purchase-money or compensation claimed by any person interested in or entitled to sell and convey the lands, and who shall not consent to such entry; or such a sum as shall be determined by a surveyor appointed by two justices to be the value of the land or of the interest therein of the party entitled, and upon giving a bond to such party for payment of the purchase-money or

(*c*) *Usborne v. Usborne*, 1 Dick. 75, and cases there; *Cox v. Goodfellow*, 8 Ves. 105, note; *Hippesley v. Spencer*, 5 Mad. 422; *Humphreys v. Harrison*, 1 J. & W. 581; per Lord Hardwicke, 3 Atk. 723; per Wigram, V.-C., *King v. Smith*, 2 Hare, 243.

(*d*) Per Lord Eldon, 8 Ves. 105.

(*e*) *Hampton v. Hodges*, 8 Ves. 105; *Humphreys v. Harrison*, *supra*.

(*f*) See 1 J. & W. 582.

(*g*) *Leake v. Beckett*, 1 Y. & J. 339.

(*h*) 8 & 9 Vict. c. 18, s. 85.

compensation, with interest from the time of entry upon the land until payment or deposit of the money. A company cannot take possession of the mortgaged land, under this enactment, without providing for the interests of the mortgagee, as well as of the mortgagor; the former being entitled to the security of the land, and to have it protected against the acts of strangers though he has not yet obtained any right to take possession. And the mortgagee will not be bound by a valuation and other proceedings purporting to be taken under the act, but without his concurrence or service of notice of the proceedings upon him; though, if the company have so dealt with the property as to render it difficult to re-value it, they will not be allowed to insist upon a new valuation (*i*).

452. The mortgagee's right to the preservation of his security has also been asserted by restraining the trustees of a turnpike road from reducing the tolls which formed the subject of the mortgage (*k*); and a judgment creditor may be restrained, at the suit of the prior mortgagee, even before the mortgage debt has become due, from taking possession of the property under the legal right acquired by an *elegit* (*l*). On the same principle, if a company mortgage a call upon its shareholders, and before it is received make another call, it cannot prejudice the mortgagees by getting in the second call at the expense of the first (*m*). The principle is also applied when the security itself is the subject of litigation. The liquidator of a company has, therefore, been restrained, at the suit of a person who claimed a lien for unpaid purchase-money, from selling part of the property, the destruction or removal of which would have affected the plaintiff's interest (*n*).

453. A person who has a contingent interest in the personal

(*i*) *Ranken v. East and West India Dock Company*, 12 Beav. 298. But it was held that the company could not be restrained from keeping possession. *S. C.* 14 Jur. 7; see *Martin v. London, Chatham and Dover Railway Company*, L. R., 1 Eq. 145; 1 Ch. 501.

(*k*) *Lord Crewe v. Edleston*, 3 Jur.,

N. S. 128, 1061; 1 De G. & J. 93.

(*l*) *Legg v. Mathieson*, 6 Jur., N. S. 1010; 2 Gif. 71; *Wildy v. Mid Hants Railway Co.*, 16 W. R. 409.

(*m*) *Hufnber Ironworks Co., Re*, 16 W. R. 474, 667.

(*n*) *Blakeley v. Dent*, 15 W. R. 663.

estate in court of a lunatic, may obtain an order that it shall not be transferred or disposed of, except on the application of the committee for the time being, without notice to the petitioner (*o*).

454. The surety for a debt has also an equitable right to the preservation of the security by reason of his liability to pay the debt (**1343**); but as the wasting of the security by the default of the creditor causes the release pro tanto of the surety, it is unnecessary for the latter to take active steps to maintain his rights.

455. The mortgagee will be entitled, for the purposes of the security, to all accretions to the mortgaged property. If therefore the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee, of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them (*p*). And upon the discharge by the owner of the equity of redemption of a prior mortgage, a puisne mortgagee will have the full benefit of the security discharged from the prior incumbrance (*q*).

So, in the case of a mortgage of or charge upon leaseholds, if a new lease or other interest of a like nature be obtained (*r*) by the mortgagor or his representative or successor, either on a forfeiture by any contrivance or otherwise of the original lease, or by other means, the owner of the mortgage or charge will have the benefit for the purpose of the security, whether he be

(*o*) Moore, Re, 1 Mac. & G. 103, following Alchin, Re, id., note.

(*p*) Doe d. Gibbons v. Pott, 2 Dougl. 709.

(*q*) Bisdee, Exp., 1 M., D. & De G. 393.

(*r*) Moody v. Matthews, 7 Ves. 174; Nightingale v. Lawson, cited there; Hughes v. Howard, 25 Beav. 575; Sims v. Helling, 21 L. J., N. S., Ch. 76; see Yem v. Edwards, 3 Jur., N. S. 462; 1 De G. & J. 598; see Trumper v.

Trumper, L. R., 8 Ch. 870. But where a sale by an execution creditor had been delayed by the court to prevent the loss which would have arisen from a forced sale, and additions were afterwards made to the property, it was held that the creditor getting the benefit of the increased value on sale could not claim the value of the additions without allowance for labour and costs. (Hill Pottery, Re, 15 W. R. 97.)

a volunteer or a purchaser for valuable consideration, and although money was expended by a volunteer in obtaining the new interest. And even at law a mortgagor could not set up against his mortgagee a title which he had acquired after the mortgage from a person who had ejected him (*s*).

456. The same law applies to a pledge, by which not only the thing itself, but also, as accessory, the natural increase thereof passes. Such is the case of the young of sheep born after the pledge of the flock (*t*). But by the terms of a mortgage of sheep with the issue, increase and produce thereof, only the increase and issue of the specified sheep and not such as are substituted for them will pass (*u*).

457. On the other hand, if the mortgagee of a term obtain a renewal, the mortgagor shall generally have the benefit of the new term, upon redemption; because the term comes from the same root, and is subject to the same equity (*x*).

The rule of course applies with greater force where the new lease has been obtained by any improper practice (*y*). But where it was obtained, not by any contrivance or unknown to the mortgagor, nor during the possession of the mortgagee, and he had given notice that he would not redeem the lease which had been forfeited, a mortgagee was held entitled to retain the new lease (*z*).

Of the Custody and Production of the Title Deeds.

458. *Secondly*, as regards the title deeds. The mortgagee in fee of freeholds is entitled to hold the deeds (*a*), and may

(*s*) Doe *d.* Ogle *v.* Vickers, 4 A. & E. 782.

(*t*) Story, Bailm. § 292; Dig. xx., tit. 1, De Pignoribus, &c., xiii.

(*u*) Webster *v.* Power, L. R., 2 P. C. 69.

(*x*) Rakestraw *v.* Brewer, 2 P. W. 511; and see Taster *v.* Marriott, Amb. 668; Rawe *v.* Chichester, id. 715; Owen *v.* Williams, id. 734; Lee *v.* Vernon,

5 Bro. P. C. 10; Pickering *v.* Vowles, 1 Bro. C. C. 197; Rushworth's Case, Freem. 12.

(*y*) See Fitzgerald *v.* Rainsford, 1 Ba. & Be. 37, note.

(*z*) Nesbitt *v.* Tredinnick, 1 Ba. & Be. 29.

(*a*) Austin *v.* Croome, Car. & M. 653; Harrington *v.* Price, 3 B. & Ad. 170.

sue for them in trover or detinue; but a mere termor for years, whatever be the length of his term, has no right, except under a special contract, to require the delivery to him of the deeds relating to the freehold (*b*). The right of the mortgagee of the whole estate of a tenant for life to the possession of the deeds will, of course, like that of his mortgagor, be subject to the right of the remainderman to have them brought into court, or otherwise secured for the benefit of the persons interested in their safe custody, and entitled to inspect them (*c*).

459. It was formerly the custom to insert in conveyances a special grant of or covenant to deliver the title deeds of the property. This has fallen into disuse, as unnecessary where the deed deals with the inheritance of the estate; and it clearly appears to be so for the purpose of giving a right to possession of the deeds, against a person who is altogether without title to hold them; as, if one who has wrongfully obtained possession of the deeds pledges them, in which case the pledgee acquires no good title against the lawful owner (*d*) (83).

It appears, however, that for want of a special grant of the deeds the mortgagee may lose his right to them, where they have come into possession of a person who has an interest in the estate to which they relate; where the purchaser* of a small part of the estate took from the vendor a covenant for the production of the deeds, which were in the hands of a mortgagee of the rest of the property, and afterwards became possessed of them as assignee of the mortgage, which he again assigned without any grant of the deeds, and retained them; it was held (*e*), that the assignee could not recover them in trover, because, for want of an express grant, he could not

(*b*) *Wiseman v. Westland*, 1 Y. & J. 117; see *Opie v. Godolphin*, Pre. Ch. 548; *Knight v. Knight*, 1 L. J., N. S. 125; but the concluding observations of the Master of the Rolls are probably misreported; *Jenner v. Morris*, L. R., 1 Ch. App. 603.

(*c*) As to which, see Sugd. V. & P.

444, ed. 14; *Davidson's Conveyancing*, vols. 1 and 2; *Lewin on Trusts*, 560, ed. 6; *Garner v. Hannington*, 22 Beav. 627; *Jenner v. Morris*, L. R., 1 Ch. App. 608.

(*d*) *Hooper v. Ramsbottom*, 6 Taunt. 14; 4 Camp. 121.

(*e*) *Yea v. Field*, 2 T. R. 708.

show a better title than the assignor. And conversely, where a forged copy of a true deed was delivered to a first mortgagee, who *had* a covenant for delivery of all deeds, it was held that he might recover the true deed in detinue or trover, against a subsequent equitable mortgagee with whom it had been deposited (*f*).

The doctrine of *Yea v. Field* was also recognized in a modern case (*g*), in which it is said to have been laid down, that though the mortgagee of a term, under a security in which the deeds were expressly mentioned, having no other interest in the estate, was bound to deliver the deeds to an assignee of the mortgage, yet not having done so, and having afterwards delivered them to the mortgagors, the latter might lawfully retain them in respect of the equity of redemption, even against a subsequent mortgagee of the fee in whose security they were not expressly mentioned.

The doctrine that the wrongful delivery of the deeds by the assignor of the term, to the mortgagors, gave a right of possession, not only against the assignee of the term who was admitted to be entitled to them, but also against the subsequent mortgagee in fee, because he had not expressly contracted for them, appears startling, and goes further than was necessary, having regard to the circumstances of the case. *

The mortgagors were husband and wife, who mortgaged under a power of appointment, and the deeds were in the hands of a person with whom the husband, being only tenant for life of the estate, had deposited them before the date of the mortgage in fee; the depositee claiming to hold them after the husband's death against the wife, then owner in fee, subject to the mortgages. As against the holder of the deeds, who at that time was a stranger to the estate, the owner of the equity of redemption might well have sufficient title to recover them. It seems, however, from the cases cited above, to be doubtful whether the general practice of omitting all mention of the deeds in securities relating to the inheritance is well founded.

(*f*) *Newton v. Beck*, 3 H. & N. 220;
27 L. J., N. S., Ex. 272.

(*g*) *Davies v. Vernon*, 6 Q. B. 443;
8 Jur. 871.

460. If the mortgage deed be delivered by the mortgagee to another person with the object of transferring to him the debt, though the delivery be ineffectual for that purpose, the deed cannot be recovered at law by the mortgagee's executor; the transaction being treated as a gift of the document, of which the donee may avail himself as far as he can (*h*): but in equity it is treated as ineffectual, and the deed will be ordered to be delivered up (*i*).

Where the tenant for life of the mortgaged estate was entitled (the mortgage being for a term) to hold the deeds, but had brought them into court for the purposes of a suit, the court refused to redeliver them without the mortgagee's consent, on the ground that he had previously taken some of them out of the jurisdiction; but Turner, L. J., thought they ought to be redelivered to the tenant for life, upon his giving security for their safe custody on the estate, and for their production and return into court if ordered (*j*).

461. The mortgagee, whether legal or equitable, cannot be compelled to deliver up possession of the deeds or other documents of title in his possession, until actual payment or tender of all that is due to him for principal, interest and costs; payment into court of the largest sum that can be due being insufficient (*k*). Except under special circumstances he cannot even be compelled to produce them on subpoena (*l*); and where the mortgage was made under a power, the persons entitled in remainder, subject to the power, have no more right to production than any other persons entitled to redeem (*m*). If documents be in the possession of persons who would be bound to produce them, as in the case of a trustee, or one of several tenants in common, the liability to production will

(*h*) *Barton v. Gainer*, 3 H. & N. 387.

(*i*) *Searle v. Law*, 15 Sim. 95.

(*j*) *Jenner v. Morris*, L. R., 1 Ch. App. 603.

(*k*) *Senhouse v. Earl*, 2 Ves. 450; *Sparke v. Montrion*, 1 Y. & C. 103; *Postlethwaite v. Blythe*, 2 Sw. 256; *Browne v. Lockhart*, 10 Sim. 420; *Greenwood v. Rothwell*, 7 Beav. 293;

Schlenken v. Moxey, 1 Car. & P. 178; *Mills v. Oddy*, 6 Car. & P. 728.

(*l*) *Doe d. Bowdler v. Owen*, 8 Car. & P. 110; *Doe v. Ross*, 7 M. & W. 102, 122.

(*m*) *Chichester v. Marquis of Donegall*, L. R., 5 Ch. 497; 39 L. J., Ch. 694.

cease when the original character of the holder is exchanged for that of a mortgagee (*n*); as, on the other hand, the holder of the deeds will lose his privilege by the discharge of the mortgage (*o*).

And although a fair mortgagee will not deny an inspection of deeds in his hands when he has notice to be paid off (*p*), he is not bound to allow it; even if the validity of the deed be disputed, or it be sought to set it aside on the mere allegation of fraud, without an allegation that the deed would disclose the fraud, and without any other special case for production being made, the mortgagee who denies notice will not be ordered to produce his security for the inspection of a person claiming to redeem (*q*), although by his answer the defendant has, for certainty, craved leave to refer to the document (*r*) when produced. The right to withhold production of deeds extends to drafts or copies of them which would equally disclose the mortgagee's title (*s*).

462. The privilege of refusing production extends generally to securities held by creditors, and as well to documents, upon which by the custom or practice of a trade or profession the holder has a lien for the value of his services (such a lien being equivalent to a special contract), as to documents expressly delivered for the purpose of security (*t*); but it appears in some cases to have been treated as less extensive in the ordinary possessory lien than in that of the solicitor, which has already been considered (308). So that a broker claiming a lien on a policy for premiums, has been compelled to produce it on behalf of the assured in an action against the underwriters (*u*); and it has been laid down, that this liability applies to such a lien as that

(*n*) *Lambert v. Rogers*, 2 Mer. 489;

Johnston v. Tucker, 11 Jur. 382.

(*o*) *Cannock v. Jauncey*, 1 Dr. 497.

(*p*) 2 Atk. 332, per Lord Hardwicke.

(*q*) *Crisp v. Platel*, 8 Beav. 62;

Dendy v. Cross, 11 Beav. 91; *Bessford v. Blakesley*, 6 Beav. 131; *Senhouse v. Earl*, sup.; *Perrat v. Balland*, 2 Ch. Ca. 73, 135, 136.

(*r*) *Howard v. Robinson*, 5 Jur.,

N. S. 136; 4 Dr. 522.

(*s*) *Bycroft v. Sibel*, 1 W. R. 96.

(*t*) *Richards v. Platel*, Cr. & Ph. 79; *Griffith v. Ricketts*, 7 Harc. 303. The remark of Turner, L. J., in *Hope v. Liddell*, 7 De G., M. & G. 339, was probably not intended to raise a doubt on this point.

(*u*) *Hunter v. Leathley*, 10 B. & C. 858.

of the carrier, the manufacturer, and the warehouseman or wharfinger (which does not deprive the owner of the right of inspection so long as he does not interfere with the possession), as distinguished from the lien of the attorney or solicitor (*x*). But in another case an order to compel a witness to produce a deed, upon which he claimed a lien as against the party who required production, was refused at Nisi Prius (*y*).

And, as in the case of a solicitor, the claim of the holder of a document to retain it under a lien will not enable him to resist production, if the object of the suit be to impeach or to recover the possession of the document itself (*z*) (308).

463. But a mortgage deed may be ordered to be produced, where, from admissions in the answer, the existence between the parties of the relation of solicitor and client, or other circumstances, the court considers that there is a suspicion of fraud or that the circumstances warrant such an order (*a*). Thus, where a judgment creditor impeached prior securities on the ground of fraud, which was suspected because the beneficial enjoyment of the goods, which were the subject of the prior security, was in the mortgagor, though another person was said to be in legal possession, production of the prior security was ordered (*b*). So, if the answer profess to set out the document of which production is required and in which the plaintiff has established an interest; or if, from the date, recitals, or other circumstances, the alleged fraud would be apparent on the very face of the instrument; showing, for instance, that a security was effected after the insolvency of the mortgagor, or by false representations of the amount due to a prior mortgagee, or that an alleged judgment debt has been discharged, production will be ordered (*c*).

(*x*) *Hunter v. Leake*, 7 L. J., K. B. 221; and see *Thompson v. Mosely*, 5 Car. & P. 501.

(*y*) *Kemp v. King*, Car. & M. 396; 2 Mood. & R. 437; and see *Reg. v. Hawkins*, 2 Car. & K. 823.

(*z*) *Beckford v. Wildman*, 16 Ves. 438; *Fencott v. Clarke*, 6 Sim. 8; *Lord Brougham v. Canvin*, 16 W. R. 688.

(*a*) *Gill v. Eyton*, 7 Beav. 155; *Bess-*

ford v. Blakesley, 6 Beav. 131; *Davis v. Parry*, 4 Jur., N. S. 431; 27 L. J., N. S., Ch. 294; see *Mills v. Finlay*, 1 Beav. 560; *Patch v. Ward*, L. R., 1 Eq. 436.

(*b*) *Neate v. Latimer*, 2 Y. & C. 257; 11 Bligh, N. S. 112; 4 Cl. & F. 570.

(*c*) *Latimer v. Neate*, 11 Bligh, N. S. 112; *Neate v. Latimer*, 4 Cl. & F. 570, explained in *Glover v. Hall*,

And so, where it was alleged that inspection of the deed would show that the signature of the receipt was procured by fraud, and there was only a general denial of notice, and no denial of the particular circumstance in question (*d*); and if a mortgagee take a conveyance of the equity of redemption from a trustee, with notice of the trust, he must produce the conveyance in a suit by the *cestui que trust* for redemption, though one of the trusts was for sale (*e*).

If a mortgagee plead the Statute of Limitations (*f*) he is also in the same position, as to the liability to produce his deeds, as any other defendant who cannot shelter himself under a mortgage title.

464. But note, that to get a right to production in these cases the plaintiff must have established an interest in the deeds. A judgment creditor, therefore, impeaching for fraud, in a case of suspicion, documents which appear by the pleadings to be only mortgages, has a right to the production of a deed, the contents of which the defendant has set out in his answer, that he may see if the contents of it be truly stated; because his interest is established by the nature of the deeds (*g*).

Where no interest is shown and the liability to disclosure is contested, even the statement of the substance of the deed gives no title to production (*h*).

465. A mortgagee who admits, by his answer, that he is mortgagee of part of certain estates, without saying of what part his security consists, and who stands upon his right to refuse production, is not bound to disclose the contents of the deed, by answering further of what part he is mortgagee (*i*). And even though it be alleged that a deed has been wrongfully

2 Ph. 484; Phillips v. Evans, 2 Y. & C. C. C. 647; and see form of order, id. 650; Hunt v. Elmes, 5 Jur., N. S. 645; Cannock v. Jauncey, 1 Dr. 497.

(*d*) Kennedy v. Green, 6 Sim. 6.

(*e*) Smith v. Barnes, L. R., 1 Eq. 65; 11 Jur., N. S. 924.

(*f*) Parkinson v. Chambers, 1 Kay & Jo. 72.

(*g*) Latimer v. Neate, 11 Bligh, N. S. 112.

(*h*) Glover v. Hall, 2 Ph. 484; and see Sampson v. Swettenham, 5 Mad. 16; Tyler v. Drayton, 2 Sim & St. 309; Lloyd v. Wait, 12 Sim. 103.

(*i*) Addison v. Walker, 4 Y. & C. 447.

set up as a mortgage, the defendant may protect himself against production, by insisting on his title as mortgagee, though if he claim under another title he must produce the deed. Thus, where the suit was to set aside a conveyance of an equity of redemption, the plaintiff alleging that the deed was originally deposited by way of equitable mortgage, but had been returned on the discharge of the mortgage, after which the defendant had regained possession of it; the defendant, not claiming his privilege as a mortgagee, but denying that there had ever been a mortgage, was ordered (*k*) to produce the deed, though if he had claimed his right he would have been protected.

466. It is not a reason for ordering production against the mortgagee or his assignee, that the assignment was made *pendente lite* for the purpose of hampering the redemption (*l*); or that by reason of a transfer of the mortgage, or of a devolution by devise, or descent of the equity of redemption, the person redeeming does not know the nature or the particulars of the deed under which the assignee claims to be entitled, or the extent of his claim; nor will the latter circumstance entitle him to have a copy of the deed even at his own cost. The assignee is bound to procure all proper parties to join in the reconveyance, and the extent and validity of his claim may be ascertained, in a foreclosure suit, by an application to the court for an account of principal and interest, under the statute 7 Geo. 2, c. 20 (*m*) (510).

467. A mortgagee is bound to produce a deed which his mortgagor was under an express or implied trust to produce; as if a lease be executed by both parties, of which there is no counterpart—for such a lease carries notice of an implied trust on the lessee's part to produce it at the lessor's request, and the lessee's mortgagees are bound also. So if the assignee of the lessor require the production of the mortgaged lease in aid of an action on the covenants (*n*).

(*k*) Jones v. Jones, Kay, vi.

(*l*) Gill v. Eyton, 7 Beav. 155.

(*m*) Lewis v. Davies, 17 Jur. 253;

Brown v. Lockhart, 10 Sim. 420.

(*n*) Doe d. Morris v. Roe, 1 M. &

W. 207; Ball v. Margrave, 4 Beav.

119.

468. No order will be made for inspection of the deeds by strangers to the suit, with whom the mortgagor is in treaty for a loan, to enable him to pay off the mortgage (*o*).

469. The general rule, like other rules of abstract justice, applies to the production of title deeds of a colonial estate subject to foreign law, unless it appear that the foreign law upon the subject is different from that of England (*p*).

470. The general rule also applies where it is intended to raise the mortgage money by sale (*q*); but in an administration suit, where mortgagees had consented to a sale of the estate, and had produced the deeds for the purpose of comparison with the abstract (which it was declared they were bound to do under the circumstances), it was also held, that as they were to be paid off out of the purchase-money, and the transaction could not be completed until delivery of the deeds, they must bring the deeds into court: but it was ordered, that they should not be delivered out without notice to the mortgagees (*r*).

471. The mortgagee will not be ordered to produce documents pledged before the commencement of the suit, and which are out of his possession or power (*s*); but the mere statement that they have been pledged is not inconsistent with the power to obtain production, and will therefore not be sufficient (*t*); nor, if ordered to produce them, is it sufficient to say that they are not in his possession or power, when they are in the possession of his solicitor in that character (*u*); otherwise, if the solicitor holds them as the solicitor of different persons, who are not represented by the person required to produce, and the latter swears that they are not in any way in his possession or power, or under his control (*x*).

(*o*) *Damer v. Earl of Portarlington*, 15 Sim. 380.

(*p*) *Bentinck v. Willink*, 2 Hare, 1.

(*q*) *Senhouse v. Earl*, 2 Ves. 450.

(*r*) *Livesey v. Harding*, 1 Beav. 343.

(*s*) *Liddell v. Norton, Kay*, App. xi.; and see *Reed v. Langlois*, 1 Mac. & G.

627, as to the possession of agents and part owners.

(*t*) *Rogers v. Rogers*, 6 Jur. 497.

(*u*) *Fenwick v. Reed*, 1 Mer. 114; *Bligh v. Benson*, 7 Price, 205.

(*x*) *Palmer v. Wright*, 10 Beav. 234.

472. It has been urged that the mortgagee's right to resist production is confined to the title deeds of the estate, and does not extend to the mortgage deed itself; for that the mortgage deed, which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must always remain open to the inspection of the mortgagor, that he may know his right to redeem (*y*). The distinction also seems to have been countenanced by an order, said to have been made by Lord King, C., upon motion by a mortgagor for the production of deeds generally, that the plaintiff should give the defendant a copy of the mortgage deed at the defendant's charge, but should not be obliged to produce the title deeds (*z*). And in another case in which the distinction was relied on, an order made by the bankruptcy commissioners to commit a solicitor, who refused to produce a mortgage deed, was supported (*a*), although no reasons were given for the decision.

But the authority of the case in *Moseley* was doubted by Sir L. Shadwell, V. C. E., who refused to compel the production of the mortgage deed even to a devisee of the mortgaged estate, who was ignorant of the particulars of the security (*b*); and the supposed exception has not generally been adopted in modern practice, as appears by the numerous * reported cases (*c*) concerning the production of the mortgage deed itself, which in fact is as much the title deed of the mortgagee as any of the earlier deeds under which the property is held, and is often the only title to or evidence of his security.

The distinction, however, was treated as subsisting by Stuart, V. C. (*d*); and more recently the Lords Justices (*e*), in an appeal in bankruptcy (but not without hesitation on the part of Turner, L. J., on the ground of the objection in equity to compel a mortgagee to produce his deeds), held that

(*y*) 2 Ca. & Op. 53.

(*z*) Anon., Mos. 246.

(*a*) Caldecott, Exp., Mont. 55.

(*b*) Browne v. Lockhart, 10 Sim. 421.

(*c*) See Crisp v. Platel, 8 Beav. 62;

Dendy v. Cross, 11 Beav. 91; Gill v. Eyton, 7 id. 155; Lewis v. Davies, 17 Jur. 253, and others.

(*d*) Patch v. Ward, L. R., 1 Eq. 436.

(*e*) Mark's Trust, Re, L. R., 1 Ch.

429.

the case of *Ex parte Caldecott* is an authority for ordering production of the mortgage deed in bankruptcy, under the powers given by the Bankruptcy Act, 1861, to the Court of Bankruptcy, to require the production of documents in the custody of persons concerned in dealings with the bankrupt, and which appear necessary to the full disclosure of the debtor's transactions and affairs (*f*). And that by virtue of section 197 of the same statute, that power extends to cases where the debtor has executed a registered deed of composition, although the deed contain no assignment of property, but only a covenant for payment of the debt (*g*). It appears to be established by this decision, upon the authority of *Ex parte Caldecott*, that in bankruptcy the mortgage deed will be ordered to be produced as not being within the mortgagee's privilege concerning the general title deeds; it might otherwise have been thought to be doubtful whether a power thus given for the general purposes of the bankruptcy ought to be exercised so as to prejudice the ordinary rights of the mortgagee, or to be applied to other cases than those in which, by reason of fraud or other exceptional cause, the mortgagee would independently of the statute be ordered by a court of competent jurisdiction to produce his title deeds (*h*). The orders made under the Judicature Acts (*i*) enable the court or a judge, during the pendency of an action or proceeding, to order the production by any party upon oath^{*} of such of the documents in his possession or power, relating to any question in the action or proceeding, as the court or judge shall think right; and to deal with such documents when produced in such manner as shall appear just. It is presumed that the discretionary powers so given will be exercised, as regards mortgagees, in accordance with the former practice.

473. The Court of Queen's Bench has also, under the act

(*f*) Under 24 & 25 Vict. c. 134, s. 189. See Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 96.

(*g*) See Bankruptcy Act, 1869, s. 125 (7).

(*h*) See *Beeston, Exp., Mont. & Mac.* 244, on the like provision in the sta-

tute 6 Geo. 4, c. 16; and see *Poole, Exp.*, 1 Ves. jun. 160, where an order on the mortgagee, whose title was affected by the bankruptcy, to deliver the deeds, was refused in bankruptcy.

(*i*) Ord. XXXI. r. 11.

to amend the law of evidence (*k*), made an order for inspection of a memorandum of deposit by way of equitable mortgage, in favour of plaintiffs claiming under the depositor of the deeds, and suing for them in detinue (*l*). The order was considered by one of the learned judges to be justified by the case of *Latimer v. Neate* (*m*), in which, however, the instrument ordered to be produced, and alleged to be a mortgage, had been set up by the defendant as conferring an absolute title, and was impeached for fraud (**463**).

474. An order will be made under the last-mentioned statute, for the inspection of books and documents in the possession of a person claiming a lien upon property, where reasonable ground is laid before the court for believing that the documents do not contain evidence in support of the case of the person in possession of it, but are material evidence for the person who seeks production (*n*), either in support of his original case, or of his answer to that of the other party.

475. If a mortgagee have taken a bad title, and a bill be filed against him for discovery and delivery of the deeds, the order will not extend to the mortgage deed, because he may still recover his right by means of it (*o*) (**325**).

As the object of the mortgagee's privilege is to prevent disclosure of the contents of his title deeds, production may be compelled for the mere purpose of inspecting an indorsement or other mark for the mere purpose of identification (*p*).

476. In a redemption suit, the mortgagee may be ordered to produce the deed at the hearing, for the purpose of proof; but the plaintiff will not be allowed to see it for any other

(*k*) 14 & 15 Vict. c. 99, s. 6, which enables the Courts and judges of the Courts of Common Law to order inspection, where, previous to the passing of the act, discovery might have been obtained by filing a bill or other proceeding in equity at the instance of the party applying.

(*l*) *Owen v. Nickson*, 7 Jur., N. S. 497.

(*m*) 4 Cl. & Fin. 570, explained 2 Ph. 484.

(*n*) *Scott v. Walker*, 2 El. & Bl. 555; 17 Jur. 916.

(*o*) *Opie v. Godolphin*, Pre. Ch. 548.

(*p*) *Phelps v. Prew*, 3 E. & B. 430.

purpose, or to have it left with the officer of the court (*g*). Production before the examiner for the purpose of proof may also be ordered (*r*), without prejudice to the question as to production at the hearing. And bills and notes, admitted to be in the mortgagee's possession, and constituting his evidence, and vouchers and accounts, will be ordered to be produced for inspection, either in a suit for redemption or administration, as not being within the rules concerning evidences of title (*s*).

477. The mortgagee of a remainderman who has a vested (but not of one who has only a contingent (*t*)) interest, and whose title is clear and free from reasonable cause of litigation, may sue the tenant for life for production and inspection of the title deeds; and if it be suggested that the production is required for an improper purpose, the burthen of proving the assertion lies on the person who resists the production (*u*). Inspection of chattels settled as heir-looms has been ordered against a person claiming a lien upon them under the tenant for life (**83**), on the application of the trustees of the will in a suit for delivery of the chattels (*x*).

478. In a suit by a puisne mortgagee for redemption of a prior mortgage, the plaintiff alleging that he is only surety for the debt, is entitled to discovery from the defendant as to what securities were held by him from the alleged principal, of which the plaintiff may be entitled to the benefit (*y*) (**1343**).

479. The mortgagor who has retained copies of the title deeds for his own purposes, and not as trustee for the mortgagee, cannot excuse himself from production on the ground of any duty towards the mortgagee (*z*); nor can he take

(*g*) *Beaumont v. Foster*, 5 L. J., 405; 1 Jur., N. S. 743; 24 L. J., N. S., N. S., Ch. 4; *M'Comb v. —*, id. 2. Ch. 381.

(*r*) *Sparke v. Montrieu*, 1 Y. & C. 103.

(*x*) *Macclesfield v. Davis*, 3 V. & B. 16.

(*s*) *Gibson v. Hewett*, 9 Beav. 293; *Freeman v. Butler*, 33 id. 289.

(*y*) *Bridgewater v. De Winton*, 9 Jur., N. S. 1270; 33 L. J., N. S., Ch. 238.

(*t*) *Noel v. Ward*, 1 Mad. 322.

(*u*) *Davis v. Earl of Dysart*, 20 Beav.

(*z*) *Hercy v. Ferrers*, 4 Beav. 97.

advantage of the mortgagee's privilege, to prevent him from giving evidence of the contents of the mortgage (*a*). And the mortgagee himself is bound in an administration suit to produce the title deeds to his own *cestuis que trust*, and cannot set up any supposed breach of confidence towards the mortgagor in so doing (*b*).

480. Where there is no right in an ordinary proceeding to the production of deeds by the mortgagee, production will not be ordered in a cross suit by the mortgagor, though an order for production will be so made in some cases, where the interests of a mortgagee are not in question (*c*).

481. A mortgagee who is ordered to produce a deed must produce every thing which depends upon it. Therefore (*d*), in a suit to set aside a conveyance of an equity of redemption, it was held that the defendant must, with the deed, produce a receipt for the mortgage money which he had obtained after the date of the conveyance.

(*a*) *Marston v. Downes*, 1 A. & E. 31.

(*b*) *Gough v. Offley*, 5 De G. & S. 653; 17 Jur. 61.

(*c*) *Damer v. Earl of Portarlington*, 15 Sim. 380.

(*d*) *Jones v. Jones, Kay*, App. vi.

CHAPTER V.

OF THE REMEDIES OF THE CREDITOR UNDER A MORTGAGE OR OTHER SECURITY.

PART 1.—OF THE GENERAL RIGHT OF THE CREDITOR TO
EXERCISE HIS REMEDIES.

PART 2.—OF THE PERSONAL REMEDY AGAINST THE DEBTOR.

OF THE REMEDIES AGAINST THE SECURITY;

PART 3.—BY THE APPOINTMENT OF A RECEIVER.

PART 4.—BY TAKING POSSESSION: AND HEREIN OF THE
RELATIVE RIGHTS OF THE MORTGAGOR, THE
MORTGAGEE, AND THEIR TENANTS.

PART 5.—BY EXECUTION UNDER JUDGMENTS.

PART 6.—BY SALE OR FORECLOSURE.

PART 7.—BY PROOF IN BANKRUPTCY.

PART 1.

482. *When the Mortgagee may sue, and when he will be restrained from suing.*

510. *Of staying Proceedings on Payment of Money into Court.*

532. *Of the Persons entitled to sue for the Mortgage Debt.*

536. *Of the Time at which the Creditor may sue, and herein of the Statute of Limitations.*

577. *Of the Evidence of the Security.*

482. AFTER the mortgage has become forfeited (*a*) by default in payment of the principal or interest (*b*), where any time has been fixed for payment; and where none has been fixed, at any time after the lending of the money, the person entitled to the mortgage debt may demand payment (*c*), and, in default of

(*a*) *Bonham v. Newcomb*, 1 Vern. 232. It may be shown by parol evidence, that an omission to pay does not amount to default within the meaning of the deed. (*Albert v. Grosvenor Investment Co.*, L. R., 3 Q. B. 123.)

(*b*) *Gladwyn v. Hitchman*, 2 Vern.

134; *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Edwards v. Martin*, 25 L. J., N. S., Ch. 284; and see *Roddy v. Williams*, 3 J. & L. 1.

(*c*) *Ca. & Op.* 51; *Jarm. & Byth. Conv. ed.* 3, vol. 6, p. 575, n.; *Glanv. bk.* 10, c. 8.

payment, may proceed to exercise the special and other remedies to which, according to the nature of his security, he may be entitled against the debtor, or his assets, and the incumbered estate: and, contrary to the general rule, that a person liable to be sued is not to be harassed by a multiplicity of suits, it is the right of the mortgagee, or other secured creditor, so long as any part of his debt remains unpaid (*d*), to enforce at the same time all his legal and equitable remedies. He may at once sue on his bond, or covenant, and bring ejectment for, enter upon, and foreclose the equity of redemption of the estate, without being restrained for vexation (*e*): he may hold the pawn without sale, while suing the pawnor (*f*); and as execution against the person of the debtor was not, except under the judgment acts (1359), a satisfaction of the claim against the estate, so the possession of the latter was not a ground for discharging the execution against the person (*g*). A derivative mortgagee may even at the same time bring two different suits for redemption or foreclosure, with which the court will not interfere, though they be carried on by the same solicitor, except by making the plaintiff pay costs for the vexation (*h*). And if it be not done to accumulate expense, the mortgagee may sue for foreclosure after a decree for redemption (*i*); though it seems that if an account have been directed by consent in the redemption suit, and the plaintiff have undertaken to pay what should be found due, the mortgagee, proceeding on the undertaking, cannot avail himself of the right of foreclosure, which, according to the ordinary practice, follows default in payment (*k*).

A prior incumbrancer may also file a bill after a decree has been obtained in another suit by the owner of a puisne charge; for he is not bound to come in under that decree, at the risk

(*d*) But if he has been paid all that he claimed in an action, he cannot sue in equity for a further sum unclaimed by mistake in the action. (*Darlow v. Cooper*, 34 Beav. 281.)

(*e*) *Burnell v. Martin*, Dougl. 417; *Barker v. Smark*, 3 Beav. 64; *Cockell v. Bacon*, 16 Beav. 158; *Lockhart v. Hardy*, 9 Beav. 349; *Rees v. Parkinson*,

2 Anst. 497.

(*f*) *Story*, Bailm. § 315.

(*g*) *Davis v. Battine*, 2 R. & M. 76; *Colby v. Gibson*, 3 Smith, 516.

(*h*) *Per Lord Hardwicke*, 1 Ves. 545.

(*i*) *Shepherd v. Titley*, 2 Atk. 348; and see 4 Y. & C. 128.

(*k*) *Dunstan v. Paterson*, 2 Ph. 341.

of losing his rights by the suspension of the proceedings in the suit (*l*).

483. The right of a secured creditor (that is a creditor who holds any mortgage, charge or lien(*m*)) on the bankrupt's estate is saved by the Bankruptcy Act, 1869 (*n*).

484. The mortgagee's right to enforce his securities is not confined to the institution of a suit which shall put an end to the mortgage. He may also at any time, until the arrival of the day of payment fixed in a redemption suit, file a bill to compel a conveyance to himself of the legal estate, or otherwise for the perfecting of his security; and this may be done even after an actual tender to him of the amount alleged to be due, if the proper notice of payment have not been given; and even after notice, if the sum tendered be considered insufficient, though at the peril of costs if it turn out that a proper amount was tendered (*o*).

And in such a suit, the court will not enter into the question of the amount due upon the security, unless, it seems, there be such a complete offer by the defendants to pay all that shall be found due, if the whole of the mortgagee's claim be established, as will enable the court to decree a foreclosure in case of non-payment in pursuance of the offer.

And for the purpose of enforcing his security upon the interest of his mortgagor in an agreement, he may sue for specific performance of the agreement (*p*).

485. The mortgagee, whether his security be legal (*q*) or equitable, may also proceed generally against the assets of the deceased mortgagor (1337, 1680), in which case he may (*r*),

(*l*) *Arnold v. Bainbridge*, 2 De G., F. & J. 92.

(*m*) Bankruptcy Act, 1869, s. 16 (5); *Emmanuel v. Bridges*, L. R., 9 Q. B. 286.

(*n*) Sect. 12; *White v. Simmons*, L. R., 6 Ch. 555.

(*o*) *Grurgeon v. Gerard*, 4 Y. & C. 119; *Malone v. Geraghty*, 3 Dru. & War. 246; 1 H. L. C. 81; see also *Sporle v.*

Whayman, 24 L. J., Ch. 789; 20 Beav. 607.

(*p*) *Browne v. London Necropolis, &c. Co.*, 6 W. R. 188.

(*q*) *Groves v. Lane*, 16 Jur. 854.

(*r*) *King v. Smith*, 2 Hare, 239; *Skey v. Bennett*, 2 Y. & C. C. C. 405; *Brocklehurst v. Jessop*, 7 Sim. 488; *Parsons v. Westbrook*, 5 Beav. 188.

and ought(s), to sue on behalf of himself and all other creditors of the mortgagor; though it was formerly considered, that the conflict between his interest and that of the other creditors, was a bar to that form of suit (t). He may also come in and prove in an administration suit, on his whole debt if he gives up his security, or on the deficiency if he does not (u). And a mortgagee has even been allowed to prove as a creditor, in a suit to administer the mortgagor's estate, after obtaining a decree of foreclosure, and contracting to sell the property; upon the terms of rescinding the contract and reconveying: but the proof will be limited in such a case to the amount recoverable at law on the mortgage covenant, and therefore will not include the costs of the foreclosure suit (x).

But where a mortgagee waited for fourteen years, during which the security, which was of a wasting nature, so deteriorated in value as to become insufficient for payment of the debt, he was not allowed to compel legatees under the will of the mortgagor to refund, though such of the general assets as were still otherwise available were made liable (y).

486. The mortgagee may also lose his remedy against the general assets, by refusing a tender of so much as has been found due to him under the administration decree, the fund in such a case being divided among the other creditors under the decree (z).

487. A mortgagee cannot claim the benefit of a deed of trust for the creditors of the mortgagor, unless he have either executed the deed, or have shown a clear intention to come in

(s) *Blair v. Ormond*, 1 De G. & S. 428.

(t) 1 Sim. & St. 362; *Raikes v. Hall*, cited 3 Y. & C. 605.

(u) *Judicature Act, 1875, s. 10.* But where the mortgagor died before the act took effect, the mortgagee might receive a dividend without prejudice to his security, so that he did not receive in the whole more than twenty shillings

in the pound. (*Rhodes v. Moxhay*, 10 W. R. 103.)

(x) *Haynes v. Haynes*, 3 Jur., N. S. 504.

(y) *Ridgway v. Newstead*, 2 Gif. 492; 3 De G., F. & J. 474; 6 Jur., N. S. 1185; 7 id. 451.

(z) *Hempstead v. Hempstead*, 4 Beav. 423.

within a reasonable time (*a*); nor can a creditor, who is not a party to the deed, sue for the performance of the trusts, and establish a charge upon the trust estate for money which he has advanced to the trustee for the purposes of the trust (*b*).

488. The mortgagee of a share of a colliery has the same remedies as the mortgagor against the co-tenants of the latter, and may therefore sue them for an account; because the mortgagee has at law the absolute interest in the mortgagor's share of the land, and the co-tenant is a stranger to the right of redemption which limits the interest in equity (*c*).

489. Where the right to the equity of redemption, or, after payment of the debt, to the title deeds, is in dispute, the mortgagee may interplead (*d*). But the court will not, at the instance of the mortgagee, direct inquiries to ascertain the title to the equity of redemption, where none of the persons claiming it are parties to the suit (*e*). The holder of goods who claims a lien upon them for charges in respect of the goods themselves may also interplead where the right to them is disputed (*f*), but not if his claim of lien is only in respect of a debt due from one of the contending parties (*g*).

490. A mortgagee who came into equity was never sent to a court of law to recover as he could; because, as the redemption to which he is subject could only be worked out in equity, the whole matter was disposed of at once under that jurisdiction (*h*). Nevertheless a mortgagee, with the legal estate, could not formerly sue in equity to set aside a voluntary settlement which did not touch the legal estate: his proper remedy being ejectment (*i*).

(*a*) *Gould v. Robertson*, 4 De G. & S. 509.

(*b*) *La Touche v. Lucan*, 7 Cl. & F. 772.

(*c*) *Bentley v. Bates*, 4 Y. & C. 182; 4 Jur. 552.

(*d*) *Shotbolt v. Biscow*, 2 Eq. Ca. Abr. 173; *Roberts v. Bell*, 7 E. & B. 323; 3 Jur., N. S. 662, under Interpleader Act (1 & 2 Will. 4, c. 58).

(*e*) *Wetherell v. Garbutt*, 1 Sm. & G. 124.

(*f*) *Cotter v. Bank of England*, 3 Mo. & Sc. 180.

(*g*) *Braddick v. Smith*, 2 Mo. & Sc. 131.

(*h*) 2 Ves. 268.

(*i*) *Elliotson v. Knowles*, 6 Jur. 549; 2 Y. & C. C. C. 293, n.

491. A mortgagee, who makes advances to trustees under a trust to raise money by mortgage or sale, is not an object of the trust, except so far as the trustees were thereby enabled to make him a good security. He has all the remedies of a mortgagee, but nothing more; and even if the trustees have power to sell after raising money by mortgage, the mortgagee cannot call upon them to exercise their power (*h*).

492. A mortgagee or other incumbrancer may sue in formâ pauperis (*l*); as may also the mortgagor—who will not be liable to be dispaupered on the ground that he has received rent from the tenants of the mortgaged estate, if it were received after notice from the mortgagee not to interfere with the property, the receipt being wrongful and an aggression on the property of another (*m*).

493. In certain cases, however, incumbrancers will not only be restrained from exercising all, or more than one, of their remedies, but even from exercising them singly. Thus the mortgagee's action of ejectment has been stayed (on security being given to redeem), on the ground of entangled accounts, where a suit for an account was also pending against the mortgagee, and it was considered beneficial to all parties to keep the possession in suspense in the meantime (*n*). And where the vendor of an estate had taken a bond for the unpaid purchase-money, he was ordered to elect in which court he would proceed (*o*). Also, the mortgagor having a right to protection against a double account of what is due on the same mortgage, a mortgagee has been restrained from proceeding in a foreclosure suit in a colonial court, begun after a decree directing inquiries and accounts in an English suit for redemption—all the parties being in England, and the facilities for taking the accounts there being greater; but the plaintiff in the English suit was put upon terms to submit to such

(*h*) *Palk v. Clinton*, 12 Ves. 49; and see *Page v. Cooper*, 16 Beav. 396.

(*l*) *Anon.*, 2 Mol. 338.

(*m*) *Perry v. Walker*, 1 Y. & C. C. C. 676; 6 Jur. 846.

(*n*) *Booth v. Booth*, 2 Atk. 343.

(*o*) *Barker v. Smark*, 3 Beav. 61.

orders in the Colonial Court as the English Chancery should think reasonable (*p*). And so the owner of an estate subject to a charge, upon paying the amount of it with interest into court, in a suit to raise the charge, has been protected by injunction from proceedings by the mortgagee of the charge to obtain possession of the land (*q*).

494. The mortgagee has also been restrained from proceeding at law on his collateral security, where the title deeds being out of his power, he was unable effectually to re-convey the estate; the amount due being directed to be ascertained and paid into the bank, there to remain until the title deeds could be secured, and a reconveyance had (*r*). And he will in like manner be restrained if having sold the estate (though he sold it fairly) for less than was due, or having transferred the mortgage without the collateral securities, he afterwards proceed to sue the mortgagor on the latter (*s*). So if he join with the purchaser of the equity of redemption in a sale, and allow him to receive the purchase-mones, the mortgagee being no longer able to re-convey the estate, will not be allowed to sue the mortgagor for the amount so allowed to be received (*t*) (1699).

495. A sub-mortgagee cannot prevent the original mortgagee from suing his mortgagor, and yet hold him liable for the debt secured by the sub-mortgage. He can, therefore, only restrain the action on the terms of releasing the original mortgagee from his personal liability on the sub-mortgage, and restoring to him any other security which may have been given; but he is entitled to have the money to be recovered in the action secured (*u*).

(*p*) *Beckford v. Kemble*, 1 Sim. & St. 7; 1 L. J., Ch. 5.

(*q*) *Duncombe v. Greenacre*, 28 Beav. 472; 6 Jur., N. S. 987; 7 id. 175.

(*r*) *Schoole v. Sall*, 1 Sch. & Lef. 176.

(*s*) *Lockhart v. Hardy*, 9 Beav. 349;

Walker v. Jones, L. R., 1 P. C. 50; 3 Mo. P. C., N. S. 397.

(*t*) *Palmer v. Hendrie*, 27 Beav. 349; 28 id. 341. As to the mode of pleading this defence at law, see *Rudge v. Richens*, L. R., 8 C. P. 358; but query the effect of the judgment.

(*u*) *Gurney v. Seppings*, 2 Ph. 40.

496. Where an annuitant has a special remedy by entry and distress, either expressly or under the statute of 4 Geo. 2, c. 28, and the rent of the property is sufficient to answer the claim, he will not be allowed to pursue the more burdensome remedy of a suit in equity (*x*) (**605**). But an incumbrancer is not generally prevented from using such remedies as are open to him on the ground that he has an easier mode of relief (*y*), or on the ground of interference with the rights of other persons claiming under the same security (though this may be a reason for staying execution) (*z*), unless the pursuit of the remedy in question would be contrary to the spirit and intention of the contract, and in breach of good faith. Such would be an action on an implied contract to recover a debt secured by a warrant of attorney, upon which the proper remedy is to enter up judgment (*a*); and the suing by a mortgagee on his security, after proving for his whole debt, when according to the construction of the deed of inspectorship the property was to be divided as in bankruptcy (*b*). Where a vendor who was liable to an action at the suit of a purchaser, on the covenant for quiet enjoyment, paid off the purchaser's mortgagee, and procured an acknowledgment that the covenant was satisfied; he was restrained from setting up the mortgage or the acknowledgment in bar of the action; because upon payment of the money the mortgagor was entitled to the benefit of the covenant, and the act of the vendor was contrary to equity and good conscience (*c*). But a creditor who has not been guilty of bad faith will not be prevented from enforcing the strict terms of a conditional contract which is not in the nature of a forfeiture (*d*), nor from exercising his remedy under a mortgage on the ground of an agreement that it should contain a clause postponing the mortgagee's right to call in the money,

(*x*) *Buxton v. Monkhouse*, G. Coop. 41; *Sollory v. Leaver*, L. R., 9 Eq. 22; *Kelsey v. Kelsey*, 17 id. 495.

(*y*) *Duncan v. Manchester Waterworks*, 8 Pr. 697.

(*z*) *Bolckow v. Herne Bay Pier Co.*, 1 E. & B. 75.

(*a*) *Sherborne v. Tollemache*, 13

C. B., N. S. 742.

(*b*) *Kingsford v. Swinford*, 4 Dr. 705.

(*c*) *Thornton v. Court*, 3 De G., M. & G. 293.

(*d*) *Parry v. Great Ship Co.*, 4 B. & S. 556; *Winthrop v. Murray*, 8 Hare, 214; 14 Jur. 302.

where the corresponding condition for punctual payment of interest has not been observed (*e*).

497. A mortgagee who has not exceeded his powers in lending on the security may do any prudent and proper act for the purpose of getting the benefit of the security, though such act would otherwise be *ultra vires* (*f*). But an incumbrancer will be restrained from exercising a power of sale in a security which was originally *ultra vires*, or made in the irregular or improper exercise of a power (*g*).

498. The mortgagee will also be restrained from doing acts in disregard of the rights of persons, subject to whose contracts with the mortgagor he has taken his security; and therefore from so dealing with a ship, as to prevent the performance of a charter-party of which he had notice (*h*) (**756**); but if the mortgagor cannot put the ship into a condition to perform the contract, and the charterer have neglected to take steps to compel its performance, the mortgagee will no longer be prevented from exercising his rights.

499. He will be controlled in the exercise of his remedies as mortgagee if by a subsequent contract with the mortgagor their respective relations have been changed (*i*). And he will be compelled to respect rights which have been acquired by third persons from the mortgagor since the date of the security, if he have done acts which amount to an acknowledgment of such rights, or if the security were taken with the knowledge that the granting of such rights was incident to the purposes to which the estate was devoted (*k*). And he will not be allowed

(*e*) *Seaton v. Simpson*, W. N. 1870, 261.

(*f*) *Royal Bank of India's case*, L. R., 4 Ch. 252.

(*g*) *Southampton Boat Company v. P'innock*; *Same v. Muntz*, *Same v. Rawlins*, 9 L. T., N. S. 748, 749; 12 W. R. 330, 331.

(*h*) *De Mattos v. Gibson*, 4 De G. & J. 276; 5 Jur., N. S. 555.

(*i*) *Drummond v. Pigou*, 2 M. & K. 168.

(*k*) *Mold v. Wheatcroft*, 27 Beav. 510; *Moreland v. Richardson*, 24 id. 33; see *Powell v. Aiken*, 4 K. & J. 343.

to cause unnecessary injury to the estate, as by cutting timber, when the security is not shown to be defective (*l*) (450).

500. Although the trustee of property belonging to a public body, being a mortgagee of the same property under an instrument made in pursuance and for the purposes of the trust, will not be restrained from exercising his rights as mortgagee, and in so doing from using the property in a manner opposed to the trusts under which he acts (*m*), where the general public are not interested under a statute in the performance of such trusts, yet where the security consists of a railway, canal or other work in the maintenance of which the general public are interested (390), under the statute which authorized its construction, the mortgagee or judgment creditor is not allowed to foreclose or to sell the undertaking, or the land or works, or to take possession under an *elegit* or otherwise than by means of a receiver (633), or to use any other remedy against the land which will interfere with the public right to the continued use of the undertaking, or with the powers which the company alone are authorized to exercise (*n*); and by statute (*o*) the rolling stock or plant used or provided by a railway company for the purposes of the traffic on their railway, or of their stations

(*l*) *Withrington v. Banks*, Sel. Ca. in Ch. 30.

(*m*) *Attorney-General v. Hardy*, 1 Sim., N. S. 338.

(*n*) *Furness v. Caterham Railway Company*, 25 Beav. 615; *Potts v. Warwick Canal Company*, Kay, 142; *Eyton v. Denbigh, &c. Rail. Co.*, L. R., 6 Eq. 488; see *Gardner v. London, Chatham and Dover Railway Company*, L. R., 2 Ch. App. 201; *Russell v. East Anglian Railway Company*, 3 Mac. & G. 104; *Wickham v. New Brunswick, &c. Railway Company*, L. R., 1 P. C. 64; 3 Mo. P. C., N. S. 416; *Doe d. Myatt v. St. Helen's, &c. Rail. Co.*, 2 Q. B. 374. Before these acts execution might be issued against the rolling stock and other chattels of the company; but if the judgment were founded on a mortgage debenture, the holder of which was entitled only to be paid *pari passu* with the holders of other deben-

tures issued by the company, he was treated in respect of his execution as a trustee for the other debenture creditors; and where a receiver had already been appointed in the suit, an inquiry was directed whether it would be for the benefit of the other debenture creditors that the receiver should take proceedings to render the judgment available for their benefit. (*Bowen v. Brecon Rail. Co.*, L. R. 3 Eq. 541; but see *Potteries, &c. Rail. Co.*, Re, 5 Ch. 67.) But it was held that if he had recovered the debt, and had been allowed to appropriate it, he could not afterwards be considered to have received it as a trustee. (*Fountaine v. Carmarthen, &c. Rail. Co.*, 5 Eq. 316.)

(*o*) *Railway Companies Act*, 1867, 30 & 31 Vict. c. 127, ss. 1, 4; continued by several acts, and made perpetual by 38 & 39 Vict. c. 31.

or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution on a judgment recovered in an action on a contract entered into after the passing of the act, or not on a contract commenced after its passing; but the judgment creditor may obtain a receiver, and, if necessary, a manager, on petition to the Court of Chancery; and the receiver, after providing for the working expenses and other outgoings, is to apply the receipts in payment of the debts of the company according to the rights and priorities of the creditors.

501. After the filing of a scheme of arrangement under the Railway Companies Act, 1867 (*g*), the Court may, on the summary application of the company on motion or petition, restrain any action against the company on such terms as the court thinks fit, and after publication of notice of the filing of the scheme in the Gazette, no execution, attachment or other process against the property of a railway company will be available without leave of the Court, to be obtained on summons or motion; the assent in writing to which scheme by three-fourths in value of the holders of the mortgages or bonds issued under the authority of the company's special acts, and by three-fourths in value of the holders of debenture stock of the company, will be deemed to be the assent of all the holders of such mortgages, bonds and debenture stock respectively; and a like proportion in value of the holders of rent-charges or payments charged on receipts of or payable by the company in consideration of the purchase of the undertaking of another company; and of mortgages, bonds and debenture stock of a leasing company will, so far as relates to such creditors, bind that company; but the assent of such creditors will be unnecessary where their interests will not be prejudicially affected by the scheme. A debenture holder, who is also a judgment creditor, will be bound in respect of his judgment and restrained from issuing execution when the scheme has been assented to by the statutory majority of

debenture holders (*r*); but unpaid landowners and outside creditors are not bound by the scheme, save that proceedings by them may be restrained during the maturing of the scheme (*s*).

502. The scheme, when confirmed under the act, is to be enrolled in the Court, and has the same effect as if enacted by parliament against and in favour of the company and all parties assenting thereto or bound thereby.

503. The mortgagee may also be prevented from using his remedies if he have neglected to furnish a proper account, and have refused a proper and sufficient tender (*t*); and he may lose his rights by laches against a later incumbrancer without notice, whom he suffers to enter and retain possession of the estate for many years, without requiring any payment on account of his security, or any admission of title (*u*).

504. When an advowson is the subject of the security, the quare impedit of the mortgagee will be restrained, upon the mortgagor's offer to redeem; and the court will compel the resignation of the mortgagee's and the presentation of the mortgagor's nominee; because the mortgagee, although he be in possession, cannot legally make any profit of the right of presentation (*x*).

505. Again, if the plaintiff in a redemption suit have made out a *prima facie* title to redeem, as by showing that he is an incumbrancer on the estate, the court, without determining in what rank he stands, or who are the other persons entitled to redeem or foreclose, will upon motion in the cause restrain the first mortgagee from transferring or assigning the mortgage

(*r*) *Potteries, &c. Rail. Co. v. Minor*, L. R., 6 Ch. 621; see *London Financial Association v. Wrexham, &c. Rail. Co.*, L. R., 18 Eq. 566; *Potteries, &c. Rail. Co., Re*, 5 Ch. 67.

(*s*) *Cambrian Rail. Co.'s Scheme*, Re, L. R., 3 Ch. 278.

(*t*) *Herries v. Griffiths*, 2 W. R. 72.

(*u*) *Searle v. Colt*, 1 Y. & C. C. C. 36.

(*x*) *Galby v. Selby*, 1 Str. 403; Ro-

binson *v. Jago*, Bunb. 130; *Amhurst v. Dawling*, 2 Vern. 400; *Jory v. Cox*, Pre. Ch. 71; *Mackenzie v. Robinson*, 3 Atk. 559; see *Gardiner v. Griffith*, 2 P. Wins. 403. But according to *Dickens*, Lord Thurlow, in such a case, directed an account of what was due on the mortgage, and payment by a short day, with injunction in the meantime; and, on the report, liberty to apply. (*Dyer v. Lord Craven*, 2 Dick. 662.)

security, and from conveying or otherwise dealing with the legal estate in the hereditaments comprised in the security, until the rights of the parties can be settled, upon the principle of protecting the security pending the litigation; but it will not interfere with the possession of the deeds (*y*). And the court will take this course the more readily if the first mortgagee have contracted to deal with the estate by surprise, or have shown an intention to deprive the puisne mortgagee of his rights; as where the agreement for sale was made after the filing of the bill to redeem, no objection having been made to the right to redeem till the six months' notice of payment had nearly expired. A sale by the mortgagee for an improper object will also be restrained (*z*).

506. The mortgagee will not be restrained from selling, upon the application of an incumbrancer claiming to restrain him from doing so, by virtue of a contract which he is at the same time impeaching. As where the assignee of a puisne mortgagee, whose assignor was privy to a transaction by which the first mortgagee's rights were admitted, had filed a bill to impeach those rights, and attempted to stop the sale, on the ground that by the same transaction the first mortgagee had limited his power of sale (*a*).

507. Nor will the court interfere with the mortgagee's action on his covenant, on the ground that a contract still incomplete has been made by him to sell the estate for a larger sum than is due on the mortgage (*b*): nor with his ejectment, because, after contracting to sell, he has brought an action on the covenant, and has compromised it on payment of a sum of money by another person whom the original mortgagee

(*y*) *Rhodes v. Buckland*, 16 Beav. 212; *James v. Bion*, 3 Sw. 234.

(*z*) *Whitworth v. Rhodes*, 20 L. J., N. S., Ch. 105.

(*a*) *Cockell v. Bacon*, 16 Beav. 158.

(*b*) *Willes v. Levett*, 1 De G. & S. 392; but the report is not very clear.

The prayer was to restrain the sale as well as the action, and the common injunction was granted in that form, and was dissolved. But the Vice-Chancellor's observations appear only to refer to the action.

afterwards redeemed for the purpose of completing his contract for sale (*c*).

508. The provisions which restrain the judgment creditor, who has obtained a charging order (*d*), from taking any proceedings to obtain the benefit of it till the expiration of six calendar months from the date of the order (**167**), do not prevent him from getting a stop order within that period to restrain payment of the dividends (*e*). The order only prevents the security from being diminished, by restraining the payment of a part of the fund which it was intended by the statute should be impounded for the benefit of the creditor.

The same principle is applied to the provision contained in 1 & 2 Vict. c. 110 (*f*), which restrains the judgment creditor from proceeding in equity to obtain the benefit of his charge, until after the expiration of a year from the entering up of his judgment.

509. The creditor is only restrained from proceeding to obtain the benefit of the charge, not from doing what is necessary to prevent the loss of the benefit; or from using all rights which he has acquired by virtue of the charge, when completed by possession under the execution. Therefore (*g*) a creditor, who has a charge upon a life interest, may have the income impounded in equity during the year, in order that after its expiration he may not lose the fruit of his charge by the failure of the subject of it. Being also entitled to proceed, either under the statute or independently of it, provided he has done what he can to obtain at law the benefit of his judgment, he may, if he have issued an *elegit*, come into equity within the year for protection of the property, even if in the case of leaseholds he may not be relieved without the

(*c*) *Davies v. Williams*, 7 Jur. 663.

(*d*) 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; Judicature Act, 1875, Ord. XLVI.

(*e*) *Watts v. Jefferys*, 3 Mac. & G.

372; *Bristed v. Wilkins*, per Wigram, V.-C.

(*f*) Sect. 13.

(*g*) *Yescombe v. Landor*, 28 Beav.

80.

elegit, as upon a wasting security (*h*). And when in possession under an execution, he may sue in equity for the redemption of a mortgage which his judgment entitles him to redeem (*i*).

Where a suit is begun by a judgment creditor, upon which he can have no relief, because the year limited by the act has not expired, and no elegit has been sued out, he cannot cure the defect by amendment after the end of the year, or by setting up a title as mortgagee, which was acquired after the suit was begun, though he may be relieved in a supplemental suit (*k*).

Of staying Proceedings on Payment of Money into Court.

510. It has also been provided by statute (*l*), that where any action shall be brought on any bond for payment of a mortgage debt, or performance of mortgage covenants, or where any action of ejectment shall be brought in any court of record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster or Durham, by any mortgagee or his representative or assignee, for recovery of the possession of any mortgaged hereditaments; and no suit shall be then depending in any court of equity in England for the foreclosing or redeeming of such mortgaged hereditaments, if the person having right to redeem such mortgaged hereditaments, and who shall appear and become defendant in such action (**517**), shall, pending such action, pay to the mortgagee, or in case of his refusal shall bring into court (**513**) where

(*h*) *Partridge v. Foster*, 10 Jur., N. S. 741; 34 Beav. 1. As to the effect of 27 & 28 Vict. c. 112, s. 1, upon this section of 1 & 2 Vict. c. 110, see *Hatton v. Haywood*, L. R., 9 Ch. 229, 234.

(*i*) *Barnes v. Thrupp*, 3 Jur., N. S. 1242.

(*k*) *Smith v. Hurst*, 10 Hare, 30; *Godfrey v. Tucker*, 9 Jur., N. S. 1188; 33 Beav. 280; 33 L. J., Ch. 559. As to the general right of creditors to proceed for the recovery of their debts

after an administration decree, see *Daniel's Ch. Pr.*, p. 1463, ed. 5; and after a resolution to wind up a joint stock company, *Lindley*, Part. 1307, ed. 3.

(*l*) 7 Geo. 2, c. 20, s. 1. The provisions of sect. 1, so far as they relate to actions of ejectment by mortgagees, have been re-enacted in almost similar words by the Common Law Procedure Act, 1852, s. 219.

such action shall be depending, all the principal monies and interest due on such mortgage, and also all costs expended in any suit or suits at law or in equity upon such mortgage (such principal, interests and costs (*m*) to be computed by the court where such action shall be depending, or by the proper officer by such court to be appointed for that purpose), the monies so paid or brought into court shall be taken to be in full satisfaction and discharge of such mortgage; and the court (518) shall and may discharge every such mortgagor or defendant from the same accordingly, and by rule of the same court compel such mortgagee, at the costs of such mortgagor, to assign, surrender or re-convey the mortgaged hereditaments and the mortgagee's estate and interest therein, and deliver up all deeds, evidences and writings (*n*) relating to the title of the mortgaged hereditaments unto the mortgagor who shall have paid or brought such monies into court, his heirs, executors or administrators, or such other person or persons as he or they shall for that purpose appoint.

511. It is also provided (*o*), that when any suit shall be brought in equity to compel the defendant or defendants, having or claiming a right to redeem, to pay the principal and interest due, or the principal and interest together with any monies due on any incumbrance or specialty chargeable on the equity of redemption, and in default of payment for foreclosure, the court on an application (519) by the defendant or defendants having a right to redeem, and on his or their admitting (520) the title of the plaintiff, may, at any time before bringing the cause to a hearing, make such decree as it might have made in case the suit had been regularly brought to a hearing; and all parties shall be bound by such decree, as if it had been made by the court at or after the hearing of the suit. But the act does not extend (*p*) to any case in which

(*m*) The costs are taxed as between party and party. (*Doe d. Caps v. Caps*, 4 Sc. 468; 6 L. J., N. S., C. P. 237.

(*n*) See *Anon.*, 2 Chit. Pr. Ca. 264.

(*o*) 7 Geo. 2, c. 20, s. 2.

(*p*) Sect. 3. See the corresponding

enactment as to actions of ejectment in sect. 220 of the Common Law Procedure Act, 1852, by which the person against whom redemption is prayed may insist in writing to the like effect under his hand or the hand of his

the person against whom the redemption is prayed shall insist in writing, before the money is brought into court, that the party praying redemption has no right to redeem (526), or that the premises are chargeable with other principal sums than those appearing on the face of the mortgage, or admitted to be due; nor to any case where the right of redemption is controverted between different defendants in the same suit, nor to the prejudice of any subsequent mortgagee or incumbrancer.

512. It was usual, at the time of the passing of this act, to secure the payment of the mortgage debt, and the performance of the covenants contained in the mortgage deed, by means of a bond, which is alone specified in the beginning of the first section as the subject of an action; but the word *bond* being treated in its broad sense as an obligation, the statute is applied also to actions upon the covenant in the mortgage deed (g).

513. The mortgagor must bring into court all that by construction is due on the mortgage. Relief was refused on payment only of interest and costs, where the mortgagee had power to enter and pay himself principal and interest on default of payment of interest; because on such default the principal was held to be immediately payable, notwithstanding a clause which postponed the payment of it for a term of years (r).

514. Where there are more mortgages than one, a court of law will not, under the statute, allow redemption on payment of the principal, interest and costs on one mortgage only (s) (1033), or on payment of what is due on the mortgage, where other monies may be tacked (t); but will not,

attorney, agent or solicitor, to be delivered before the money shall be brought into Court, to the attorney or solicitor for the other side.

(g) *Dixon v. Wigram*, 2 Cr. & J. 613; *Smeeton v. Collier*, 1 Exch. 457; 5 Dowl. & L., P. C. 184.

(r) *Goodtitle d. Green v. Notitle*, 11 Moore, 491.

(s) *Roe d. Kaye v. Soley*, 2 W. Bl. 726.

(t) *Felton v. Ash*, Barnes, 177; see *Goodright v. Moore*, Barnes, 176.

in addition to the mortgage debt, compel payment of bond or simple contract debts (*u*), which cannot be tacked to the mortgage, except against the heir (1014); nor of other monies not secured by the mortgage, as interest due before its date, or the costs of preparing the mortgage (1633), or of an assignment of it (*x*): which latter, indeed, are not, as of course, allowed to the mortgagee, even by courts of equity, which are not fettered by the language of the first section of this statute. And the object of the statute being to relieve the mortgagor from the delay and expense of a suit in equity for redemption, and not to lessen the rights of the mortgagee, and there being no provision for accounts or allowances where the mortgagee has been in possession, the application of the statute is limited to cases in which it would be equitable to relieve on payment only of principal, interest and costs of suit; viz. where the mortgagee is not in possession, and has not attempted to exercise the power of sale. And where he has attempted to sell, an order for reconveyance has been refused unless the mortgagor would consent to pay the costs incurred (*y*).

515. Under the third section of the act, if the person against whom the redemption is prayed shall deny the right to redeem, or shall insist that the premises are chargeable with other sums, he must not content himself by giving a simple notice to that effect, but must state such facts as will enable the court to form an opinion as to the ground upon which the right is disputed (*z*), or the nature and amount of any further demand which may be claimed by the mortgagee, beyond the principal, interest and costs; both because the court is bound to see the nature of the question raised and the reality of the demand, and because, in the latter case, the defendant cannot otherwise be expected to admit its validity (*a*). If the mortgagee claim interest during the interval between the granting of the rule to stay proceedings

(*u*) *Bingham v. Gregg*, Barnes, 182; *Archer v. Snatt*, 2 Str. 1107.

(*x*) *Doe d. Blagg v. Steel*, 1 Dowl. P. C. 359.

(*y*) *Sutton v. Rawlings*, 3 Exch. 407; *Dowle v. Neale*, 10 W. R. 627.

(*z*) *Doe d. Harrison v. Lench*, 18 L. J., Q. B. 278; 14 Jur. 853; 6 Dowl. & L. 270, notwithstanding *Filbee v. Hopkins*, id. 264.

(*a*) *Goodtitle d. Leon v. Lonsdown*, 3 Aust. 937.

and the actual payment of the money, he must also claim it at the time of discussing the rule (b).

516. The court cannot order the mortgagee to pay the costs of the rule, on the ground that he refused a tender of the amount due (c); nor will any claim for costs incurred at law before the commencement of the suit be allowed on a proceeding in equity under the statute, unless, as is also necessary where the cause comes to a regular hearing, the claim be raised on the pleadings (d). But costs incurred after the commencement of the suit may be allowed (e).

517. Unless the mortgagor himself have appeared, and become defendant in an action of ejectment (510), the court cannot interfere (f), either under its statutory or its general power, over the action; it is not sufficient that the actual defendant, at the time of the application, is the authorized agent of the mortgagor (g). So, if the mortgagee have obtained possession in an undefended action of ejectment, possession cannot be restored to the mortgagor under the statute on payment of principal, interest and costs (h). But where the recovery was against the mortgagor's tenant, the court was prepared to set aside the judgment and to let in the mortgagor to defend as landlord, that he might be able to apply to stay proceedings under the terms of the statute.

The mortgagor is sufficiently shown, for the purposes of the statute, to be a defendant, if he swear that he has entered the usual appearance, though he omit to state that he has entered into a consent rule; if there be no evidence that he has omitted to do so (i).

518. The power given in general terms to the courts

(b) *Jordan v. Chowns*, 8 Dowl. P. C. 709.

(c) *Doe d. Simpson v. Bunn*, 1 W. & H. 49.

(d) *Millard v. Magor*, 3 Mad. 433.

(e) *Dawkins v. Evans*, 9 L. J., Ch. 179.

(f) *Doe d. Orchard v. Clifton*, 6

Nev. & M. 857; *S. C. Doe d. Hurst v. Clifton*, 4 A. & E. 814.

(g) *Doe d. Orchard v. Clifton*, *supra*.

(h) *Doe d. Tubb v. Roe*, 4 Taunt. 886.

(i) *Doe d. Cox v. Brown*, 6 Dowl. P. C. 471; *Doe d. Simpson v. Brown*, 2 Jur. 841.

of common law, by this statute, to order the delivery of deeds, may be exercised by a judge at chambers (*k*).

519. The application in equity under the statute may be made either by petition or motion, upon the hearing of which the court will, in a proper case, make a decretal order, directing (*l*) an account of the principal and interest due, and taxation of the plaintiff's costs, and that on payment within six months of the amount found due, the plaintiff do re-convey; but in default of payment that the defendant be foreclosed, with the usual directions.

520. The admission of the plaintiff's title required by the statute, as a foundation for the application, is such that the defendant cannot dispute (*m*) the amount of principal stated by the bill to be due; nor can evidence be admitted that payments have been made in reduction of principal, notwithstanding a statement to that effect in the petition. And it was said (*n*) by Lord Redesdale, then Solicitor-General, that if the defendant applied before answer, he must take the statement of the bill to be true; but that the court made no order where the plaintiff was aware of the objection but had not admitted it and offered an issue.

The defendant must submit not only to the demand, but also to the relief prayed in the suit, and to which the plaintiff would be entitled at the hearing; and he cannot have an order for an account, and that on payment within six months the mortgagee may re-convey, and that proceedings may be stayed in the meantime, without the order for foreclosure in default (*o*).

521. All the defendants who have a right to redeem are required by the act to join in the application, and admit (*p*)

(*k*) *Smeeton v. Collier*, 1 Exch. 457;
5 D. & L., P. C. 184; 17 L. J., N. S.,
Ex. 57. See Judicature Act, 1873,
s. 39.

(*l*) 2 Van Heythuysen, 390.

(*m*) *Huson v. Hewson*, 4 Ves. 105.

(*n*) Jd. 106.

(*o*) *Praed v. Hull*, 1 Sim. & St. 331.

(*p*) See the Judicature Act, 1875.
Order xix. 17.

the plaintiff's title; therefore it was said, that the assignees of a bankrupt mortgagor, whose bankruptcy happened after the commencement of the suit, could not have an order without the bankrupt's concurrence, because the decree would give him a right to redeem (*g*). Also there can be no order, because there can be no admission, where one of the defendants is an infant (*r*).

Nor will the court generally make a decretal order against infant defendants (1745), under its inherent powers, to the same effect as an order under the statute; where the plaintiffs would thereby be enabled to foreclose the infant's estate (*s*); although the mere fact that the infants are parties to the suit as *cestuis que trust*, where their interests are subject to the paramount right of a consenting defendant (such as the right of an administrator to deal with the assets which are the subject of the mortgage), will not prevent the court from making the order (*t*).

522. An objection having been made by a plaintiff, whose bill contained the usual suggestion that the defendant had dealt with the equity of redemption, that a discovery of subsequent incumbrances was necessary for the safety of the title by foreclosure, leave was given to the defendant to produce an affidavit upon the subject (*u*); and the necessity for the discovery appears from the fact, that the defendant had actually sold the estate. But in a latter case (*x*), Shadwell, V. C. E., held, that no such affidavit was necessary.

523. The statute does not leave the court without discretion, so as to compel it, contrary to its usual practice, to relieve a person in contempt (*y*).

524 It seems that simple foreclosure suits only are con-

(*g*) Garth v. Thomas, 2 Sim. & St. 188.

(*r*) Lushington v. Price, 9 Sim. 651.

(*s*) Taylor v. Coates, 3 Hare, 263.

(*t*) Id. and Grane v. Mitchell, 10 Sim. 484.

(*u*) Piggin v. Cheetham, 2 Hare, 80; 6 Jur. 819.

(*x*) Reeves v. Glastonbury Canal Company, 14 Sim. 351.

(*y*) Hewitt v. M'Cartney, 13 Ves. 560.

templated, and not those in which another demand is set up independent of the foreclosure, though Lord Eldon thought that a reference might justly be made as to the mortgage, and that the cause should go on as to the other matters (*z*). And relief is said to have been refused in equity, where the mortgagee sought to tack other demands to his mortgage (*a*).

525. It is clear that the statute does not apply to a suit in which a sale is prayed (*b*); but in such a suit, the court, under its general powers, will direct an account of the principal, interest and costs found due (*c*).

526. The provisions of the third section of the act appear to be satisfied by the production of affidavits, showing an actual ground for disputing the right to redeem; as for instance that the mortgagor had agreed in writing to sell the equity of redemption to the mortgagee (*d*); and it has been laid down that the act was intended to apply only where the right to redeem was clear beyond all doubt (*e*).

527. Where the mortgagee has brought an action, it is indispensable that an application under the statute be made, if at all, before he is entitled to take out execution (*f*); the reason, it is presumed, being that the mortgagee is not to be deprived or delayed in taking advantage of the fruit of his diligence; the statute not being for his prejudice, but for the benefit of the mortgagor. But this consideration does not prevent the court from enlarging the time for payment on the usual terms under a statutory order, the matter being treated, under the

(*z*) *Bastard v. Clarke*, 7 Ves. 489.

(*a*) *Vaughan v. Lloyd*, cited 7 Ves. 489.

(*b*) *Praed v. Hull*, 1 Sim. & St. 331.

(*c*) *Aberdeen v. Chitty*, 3 Y. & C. 382.

(*d*) *Goodtitle d. Tatum v. Pope*, 7 T. R. 185; but an application in similar circumstances under 4 Ann. c. 16 (which provides for the discharge of debts on bonds subject to defeasance, where the

money shall have been brought into court, or paid before action, though not strictly according to the condition, ss. 12, 13), was granted, after deliberation, on the ground that no suit in equity had been brought for the performance of the contract. (*Skinner v. Stacey*, 1 Wils. 80.)

(*e*) Per Alexander, C. B., *Goodtitle v. Bishop*, 1 Y. & J. 344.

(*f*) *Amis v. Lloyd*, 3 V. & B. 15.

latter words of the second section, as if the cause had been regularly brought to a hearing (*g*).

528. The order made under the statute is a decree, and therefore cannot be discharged on motion (*h*).

529. It is said (*i*), that the object of this statute was merely to give a new jurisdiction, in the case of mortgages, to courts of law; the second section, as to courts of equity, being merely incidental and unnecessary: because there was always in those courts an inherent jurisdiction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant will submit to a decree, establishing the full demand made by the bill, and giving the whole relief prayed in respect of that demand with costs.

The court will accordingly stay proceedings, under its inherent powers, upon payment or tender by a *puisé* incumbrancer of the principal, interest and costs of the plaintiff, and upon bringing into court a sum sufficient to cover the costs of the defendant, so far as the plaintiff is liable to them, until the amount has been ascertained (*h*). And the other defendants cannot resist the motion on the ground of hardship upon them, in dismissing a suit by which they hoped to get their rights, and for the prosecution of which they relied upon the plaintiff: because, up to the time of the decree, the defendants have no control over the suit, the plaintiff being *dominus litis*, and being besides always liable to be paid off. But the court will refuse to make such an order, where it would affect the interests of the other defendants, by interfering with questions as to the priorities of the incumbrances on the estate; or with an order of the court made in another suit relating to the same securities; though even in such a case it will anticipate the decree at the hearing by ordering inquiries as to the priorities

(*g*) *Wakrell v. Delight*, 9 Ves. 36; *Coop.* 27.

(*h*) *Cadle v. Fowle*, 1 Bro. C. C. 516.

(*i*) *Praed v. Hull*, 1 Sim. & St. 331; *Boys v. Ford*, 4 Mad. 40; *Damer v.*

Earl of Portarlington, 2 Ph. 30; 10 Jur. 673; see form of order there, *Paynter v. Carew*, Kay, xxxvi.

(*h*) See form of order in *France v. Cowper*, W. N. 1871, 76.

of, and the amounts due to, the incumbrancers, and if proper by directing a sale (*l*).

In another case in equity (*m*), a motion for reconveyance and stay of proceedings in a suit by a *puisé* incumbrancer, against the mortgagor and other mortgagees for foreclosure, was granted on payment into court by the defendant of enough to cover the principal and interest due to the plaintiff, and the costs of him and the other mortgagees, defendants to the suit, as between solicitor and client. A rule at law (*n*) for reconveyance and delivery of the deeds by a first mortgagee, who had received notice from a second mortgagee not to part with them, seems more open to question, considering the duties of a first mortgagee in such a position; but it was said that several modes might be adopted to prevent injury to the second mortgagee through the the interference of the court.

530. Where the circumstances of the case prevent the court from making an order under the statute, it will sometimes make such a decree under its inherent powers, as it might have made at the hearing (*o*); viz. for account and foreclosure, in default of payment on a given day; and it appears by reported cases (*p*), that the court has even stayed proceedings on payment, on or before a certain day, without giving the plaintiff his right of foreclosure on default of payment at that day; but with a proviso, that on such default it should be deemed that no order had been made on the application. This, however, seems hardly to meet the rights of the mortgagee, who is undoubtedly entitled to proceed upon all his remedies, without being stopped or delayed otherwise than by payment of all that is due. And Wood, V. C., refused (*q*), where no tender or payment has been made, to make any order to stay proceedings which would give the plaintiff less than the decree of foreclosure on default of payment at the day named; refusing

(*l*) *Paine v. Edwards*, 8 Jur., N. S. 1201.

(*m*) *Laslett v. Cliffe*, 5 Jur. 403.

(*n*) *Dixon v. Wigram*, 2 Cr. & J. 613.

(*o*) See *Aberdeen v. Chitty*, 3 Y. & C. 382, where a sale was ordered.

(*p*) *Jones v. Tinney*, Kay, xlv.; *Challie v. Gwynne*, Kay, xlv.

(*q*) *Paynter v. Carew*, Kay, xxxvi.

also to make a decree of absolute foreclosure on default, where there were many defendants, because a partial decree against one defendant only ought not to be made. The inference therefore seems to be, that where no payment or tender has been made, and there are several defendants entitled to redeem, and not consenting to the application, the court ought not to make an order under its own powers, on the application of one of such defendants, staying proceedings on payment at a given day, with foreclosure on default against the defendant seeking the order.

531. Under its general powers, and upon considerations of policy or convenience, the court will also stay proceedings in suits, independently of any submission to the demand made by the bill. Thus, where a plaintiff had already filed two harassing bills for redemption, which were dismissed, the proceedings in a third suit, commenced for the same purpose, were stayed (*s*) until payment of the former costs. And the court has stayed a suit for redemption, against an ambassador, for a year and a day, unless he should sooner return from his embassy (*t*); upon the principle that he is entitled, as a public officer, to be protected against suits during his absence. And to the same effect, says Lord Coke (*u*), that, “as to the king’s soldier, and the king’s ambassador, both these being for the publique good of the realme, private transactions and suites must be suspended for a convenient time.”

Of the Persons entitled to sue for the Mortgage Debt.

532. It was formerly considered, that, although where there was a collateral security by bond or covenant for the mortgage debt, it belonged to the personal representative of the mortgagee; yet that if there were no such security, nor any want

(*s*) *Calvert v. Ronth*, 4 Y. & C. 514. As to applications at law to stay proceedings on forfeiture of a bond by non-payment of interest, see 4 Ann. c. 16, s. 13; *Darby v. Wilkins*, 2 Str. 957; *Van Sandau v. —*, 1 B. & Ald. 214;

Wheelhouse v. Ladbroke, 3 H. & N. 291.

(*t*) *Pilkington v. Stanhope*, 2 Vern. 317.

(*u*) *Co. Litt.* 130 a.

of assets, and the condition of a mortgage in fee was for payment to the heirs or assigns, or to the heir or executor, the heir might become entitled to the land, as real estate absolutely vested in the mortgagee (*x*). But it was soon after adjudged, and has ever since been held, that in all mortgages the money must go to the executor or administrator and not to the heir of the mortgagee, unless the latter in his lifetime (*y*), or by his will (*z*), do otherwise dispose thereof. And this doctrine rests on the ground that the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; as soon as the mortgagor pays the money, the land belongs to him, and the money only to the mortgagee. And the question of assets or no assets, or the existence or want of a personal security, was declared to be no measure of justice to the personal representative, but only a pretence to favour the heir (*a*). Nor is the entry by the mortgagee an act which makes the mortgage part of his real estate (*b*).

533. The heir of the mortgagee is, therefore, before foreclosure, or release of the equity of redemption, only a trustee for the mortgagee's executors, and if the mortgagor himself be the heir of the mortgagee, the legal estate will not pass to

(*x*) *Smith v. Smout*, 1 Ch. Ca. 88; *St. John v. Grabham*, 11 Car. 1, cited there. At law the old rules were, that if the money were merely made payable to the feoffee, it should be paid on his death to his executor; except that if only a partial payment were made, and fraudulently accepted by the executor, the estate should not be divested out of the heir. (Lit. 339; Co. Lit. 209 b.) That if the condition were to pay to the mortgagee or his heirs, the latter should receive it, because they were appointed by the parties themselves; if to the feoffee, his heirs or assigns, the payment must be to the heirs, and not to the executors, who are not assigns at law of the estate, because the mortgagee, being seised of the estate, could make assigns by deed; and if under

the last form of condition the feoffee assigned over, the payment might be made either to the first feoffee or his heirs, or to the second feoffee, the feoffor not being bound to take notice of the second feoffment, and the first feoffee and his heirs being expressly named in the condition. (Co. Lit. 210 a.) But a covinous payment would not defeat the heir of the second feoffee. (*Goodall v. Wyet*, Cro. Eliz. 383; *Moor*, 708.)

(*y*) *Cotton v. Iles*, 1 Vern. 271.

(*z*) *Noys v. Mordaunt*, 2 Vern. 581.

(*a*) *Thornborough v. Baker*, 1 Ch. Ca. 283; 3 Sw. 628; *Mecker v. Tanton*, 2 Ch. Ca. 29; *Wiun v. Littleton*, 1 Vern. 3; *Tabor v. Grover*, 2 Id. 367; *Canning v. Hicks*, 1 Vern. 412.

(*b*) *Noy v. Ellis*, 2 Ch. Ca. 220.

the devisee of the mortgagor, under a general devise of real estates in trust for sale (*c*); for to hold the contrary would be to assume that the mortgagor had authorized his devisee to make a sale, which would be a direct breach of trust.

But, where the heir of the mortgagee obtained a decree of foreclosure, and after the day of payment had passed, the mortgagor discovered that the money had been given to the executor, and filed an original bill, praying liberty to pay the money to him, it was held (*d*), that the plaintiff was for ever foreclosed; but it was ordered that the heir should sell the land, and the executor should have the value. The purchase-money was ordered into court, till the heir and executor had interpleaded, and the mortgagor was discharged from payment to the latter. In another case (*e*), *Jefferies*, L. C., is reported to have said that the heir might, if he would, keep the land, and take the benefit of foreclosure, on payment of the debt to the executor. It is, therefore, too late, as it seems, for the mortgagor to complain, after decree, that he has been foreclosed by the wrong party.

534. After a release of the equity of redemption, or absolute foreclosure, the estate being no longer a mere security (1778), will pass to the heir or devisee (*f*). And even though the foreclosure be incomplete, if the estate be devised as realty, it will be so as between the devisor and the devisee (*g*), and upon an enlargement of time for redemption (1688), the latter would seem to be entitled to the money; for it is plain, that whether the gift have the quality of money or land, the devisee may equally have been the object of the mortgagee's bounty. But, as against creditors, the incomplete foreclosure does not prevent the security from remaining personal assets for payment of the mortgagee's debts (*g*); nor does it seem proper, that if the estate have descended after the order absolute for foreclosure has been obtained by the mortgagee, and the fore-

(*c*) *Marshall*, Exp., 9 Sim. 555.

(*d*) *Earl of Carlisle v. Globe*, Freem. Ch. R. 148; differently cited, 2 Vern. 67.

(*e*) *Clerkson v. Bowyer*, 2 Vern. 66.

(*f*) *Thompson v. Grant*, 4 Mad. 438.

(*g*) *Garrett v. Evers*, Mos. 364.

closure be afterwards opened on the ground of fraud, collusion, or irregularity of process, the heir should be entitled to the redemption money, because under such circumstances he could hardly have any equity against the mortgagee's personalty; but if the foreclosure be opened for a reason which does not touch the honesty or regularity of the transaction, the heir would no doubt be entitled to the money: and even in cases of fraud, if he lost the estate, he would be entitled to the value of improvements (1533).

535. The estate will not be treated as realty in the hands of the mortgagee, where there has been no foreclosure, on the ground that at the filing of the bill an absolute title has been acquired by possession, under the Statute of Limitations; if, at the date of the accruer of the right which is claimed by the bill, there was clearly only a mortgage title (*h*).

Of the Time at which the Creditor may sue, and herein of the Statute of Limitations.

536. There will be no foreclosure until default in payment, according to the agreement (*i*); but as the right of redemption may be postponed, during a certain period (1187), so the mortgagee's right to call in the money, and consequently to foreclose or sell may also be limited (*h*); and the limitation may be greater than that upon the right to redeem; for the same reason does not exist for guarding the rights of the mortgagee as of the mortgagor. There is, therefore, no objection to an agreement that the debt shall not be called in during the lifetime of any particular person; and unless fraud were proved, it is probable that no objection would be made to any postponement of the right.

537. If there be an absolute covenant not to call in the money, during a certain period, no default in payment of in-

(*h*) *Flack v. Longmate*, 8 Beav. 420.

(*i*) *Bonham v. Newcomb*, 1 Vern. 232.

(*k*) *Burrowes v. Molloy*, 2, Jo. &

Lat. 521; see *Ramshotom v. Wallis*, Coote, App. 580; 5 L. J. (N. S.) Ch. 92.

terest during that period will enable the mortgagee to sue, notwithstanding the breach of the condition in the mortgage; though if there be no such covenant, the mortgagee can sue at any time after default of payment of interest, however distant may be the day at which payment of the principal money is reserved (*l*), unless he have waived the default by afterwards accepting the interest (*m*).

Such a covenant also affects the right to sue in respect of any monies, to which the mortgagee becomes entitled in that character; and even of salvage claims (as for advances of head rent) during the period included in the covenant (*n*), but not in respect of injuries to the security (*o*).

Neither can a *puisné* mortgagee, who has covenanted not to foreclose during a certain time, proceed to redeem the first mortgagee, and to get a conveyance of the legal estate (*p*), for he has no right to sue the mortgagor, or to bring him before the court, because of the covenant, and without the mortgagor the first mortgagee cannot be sued (1428).

538. A solicitor cannot enforce a charge upon his client's estate for costs by suit, pending the taxation of the costs. An action for such a purpose will be dismissed with costs, without prejudice to future proceedings after completion of the taxation; but it seems that if the suit be only to establish the charge, it may be ordered to stand over until the taxation be completed (*q*).

539. It was enacted by sect. 40 of 3 & 4 Will. 4, c. 27, that no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon (*r*) or payable out of any land or

(*l*) *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Stanhope v. Manners*, 2 Ed. 196.

(*m*) *Langridge v. Payne*, 2 J. & H. 423. See *Taafe, Re*, 14 Ir. Ch. R. 347.

(*n*) *Burrowes v. Molloy*, *supra*.

(*o*) *Dugdale v. Robertson*, 3 Jur., N. S. 687.

(*p*) *Ramsbottom v. Wallis, Coote*, Mort. App. 580; 5 L. J., N. S. 92.

(*q*) *Waugh v. Waddell*, 16 Beav. 521.

(*r*) This does not include bond debts, by which the heir is bound. (*Roddam v. Morley*, 2 Kay & J. 336. See *S. C.* 1 De G. & J. 1; 3 Jur., N. S. 449.)

rent, at law or in equity, or any legacy, but within *twenty* (*s*) years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given, in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within *twenty* (*s*) years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one was given (*t*). The right to file a bill of foreclosure is not affected by the above-mentioned provision, but falls within sect. 24 of the same act and the act 1 Viet. c. 28: the former of which provides, that no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the same act, he might have made an entry, or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity—viz., *twenty* (*s*) years (*u*) next after the accrual of the right to make the entry or distress, or to sue, to the plaintiff, or to some person through whom he claims: and the latter, that any person claiming under any mortgage of land may make an entry or bring an action at law, or suit in equity, to recover such land, at any time within *twenty* (*s*) years next after the last payment of any part of the principal money or interest secured by such mortgage; though more than *twenty* (*s*) years may have elapsed since the right to make the entry, or to bring the action or suit, shall have first accrued.

540. A mortgagee who does not come to the court as a

(*s*) On and after 1st January, 1879, the word *twelve* must be substituted for *twenty*. (Real Property Limitation Act, 1874, c. 57, ss. 8, 1, 9.)

(*t*) *Wrixon v. Vize*, 3 Dru. & War.

104, overruling *Dearman v. Wyche*, 9 Sim. 570; *Henry v. Smith*, 2 Dr. & War. 387.

(*u*) Real Property Limitation Act, 1874, s. 2, et seq.

plaintiff to enforce his rights, but is made a defendant by a creditor to complete a purchaser's title and procure the distribution of funds set apart to indemnify him against the charge, is not bound by the statute (*x*).

541. The purchaser of a mortgaged estate, to whom both the mortgagor and mortgagee convey, is a person claiming under a mortgage within the latter act, although the mortgage no longer exists; and time runs under 3 & 4 Will. 4, c. 27, from the payment of the mortgage debt and interest (*y*).

542. The assignee of a mortgage, made more than twenty years before the action, but on which the mortgagor had paid interest within twenty years, was held to have a right of entry under 7 Will. 4 & 1 Vict. c. 28, against a defendant who had been in possession by the mortgagor's sufferance without paying rent, or making acknowledgment, for a period commencing more than a year before the date of the mortgage; though the mortgagor's right, which accrued before the mortgage, was barred by time under 3 & 4 Will. 4, c. 27 (*z*).

543. The act of 3 & 4 Will. 4, c. 27, also declares (*a*), that when any acknowledgment of the title of the person entitled to any land or rent, shall have been given to him or his agent in writing signed by the person in possession or receipt of the profits or rent, such possession or receipt, of the person giving the acknowledgment, is deemed to have been the possession or receipt of or by the person to whom it is given, at the time of giving the same (*b*); and the right of the latter person to sue is deemed to have accrued at, and not before, the time of giving the acknowledgment, or the last of the acknowledgments, if more than one (**560**).

(*x*) *Murphy v. Sterne*, 1 Dr. & Wal. 236.

(*y*) *Doe d. Baddeley v. Massey*, 17 Q. B. 373.

(*z*) *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Ford v. Ager*, 2 H. & C. 279; 7 Jur., N. S. 804.

(*a*) Sect. 14.

(*b*) *I. e.*, the time of the signing of the writing, where it differs from the time at which it is dated. (*Jayne v. Hughes*, 10 Exch. 430; 24 L. J. (N. S.) Ex. 115.)

544. An allowance of *ten* years is made for persons under disability,—by reason of infancy, coverture, idiotey, lunacy, unsoundness of mind or absence beyond seas,—and their representatives, from the termination of the disability, or from death (*c*). No action can be brought by any person under disability when his right first accrued, but within *forty* years next after the accruer of the right, though such disability may have lasted during the whole of that period, or though the term of *ten* years from the cessation of any such disability shall not have expired (*d*); and where a person under disability at the accruer of the right shall die during the disability, no time to sue beyond the *twenty* years next after the accruer of the right, or the *ten* years next after the death of the person under disability, shall be allowed by reason of the disability of any other person (*e*).

545. Although section 24 of 3 & 4 Will. 4, c. 27, is so framed as to exclude legal mortgages, according to the letter of the act (for it speaks of the mortgagee's rights to sue, as if he *had been* entitled at law), it is held (*f*), upon the plain intention of the act, and upon the terms of the act of Victoria, that legal securities are also included.

Where a mortgage, executed only by the mortgagor, conveyed the legal estate at once to the mortgagee, and there was a covenant for quiet enjoyment *after* default, but no intention was shown that the mortgagor should enjoy the land, between the execution of the deed, and default in payment of the money; it was held (*g*), that the covenant meant only that,

* (*c*) 3 & 4 Will. 4, c. 27, s. 16, reduced to six years, on and after 1st January, 1879. (Real Property Limitation Act, 1874, c. 57, s. 3; disability by reason of absence beyond seas being excluded, sect. 4.)

(*d*) 3 & 4 Will. 4, c. 27, s. 17. Periods reduced to thirty years, and six years on and after 1st January,

1879. (Real Property Limitation Act, 1874, c. 57, ss. 5, 3.)

(*e*) 3 & 4 Will. 4, c. 27, s. 18. Periods reduced to twelve years, on and after 1st January, 1874. (Real Property Limitation Act, 1874, ss. 1, 3.)

(*f*) *Wrixon v. Vize*, 3 Dr. & War. 104, 118.

(*g*) *Doe v. Lightfoot*, 8 M. & W. 553.

before default, the mortgagee should rest upon his own title as against strangers; and time was held to run against the mortgagee from the date of the mortgage, and not from the day of default in payment.

546. The word "judgment," as used in the 40th section of the act of Will. 4, is not confined, in its meaning, to cases in which judgments can only be enforced against real estate, on account of the nature of the debtor's assets, but applies (*l*) also to cases in which personalty is subject to the judgment.

547. The limitation created by the statute applies equally, whether the interest mortgaged be reversionary or not; a mortgage of a reversionary interest being subject (so far as its nature admits) to the same rules of law as any other security (*m*).

548. Before the passing of the statute 3 & 4 Will. 4, c. 27, it was held (*n*), that, although a creditor's demand were in strictness barred by the rule of equity, used by analogy to the old Statute of Limitations, yet that rule would not be applied against him, if it appeared that he had delayed his suit in confidence of the prosecution of an existing suit, by another creditor, on behalf of himself and other creditors; because every creditor has an inchoate right in such a suit, to the extent of its being considered as a demand. After the passing of the statute (sect. 40), a case occurred (*o*), in which it was determined that where a creditor, knowing nothing of the prosecution of a former suit, comes to the court after discovering that suit, and after the statute has otherwise barred his remedy, and claims payment out of a fund in court in the former suit, he shall have no relief; because the statute makes

(*l*) *Watson v. Birch*, 15 Sim. 523.

(*m*) *Sinclair v. Jackson*, 17 Beav. 405; *Humble v. Humble*, 24 Beav. 535; 3 Jur., N. S. 1289.

(*n*) *Sterndale v. Hankinson*, 1 Sim. 393. The doctrine is far too broadly stated in the margin of the report.

See the judgment, and see the case explained, 1 Y. & C. 438.

(*o*) *Berrington v. Evans*, 1 Y. & C. 434; followed in *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Hutchins v. O'Sullivan*, 11 Ir. Eq. R. 443.

no exception in favour of a bill filed by one creditor for the benefit of the rest. But the question was left open, whether, if the creditor's suit were prosecuted with the knowledge and consent of him who afterwards claimed the benefit of it, and who had trusted to its prosecution, it would not so far be his suit that the statute would be inapplicable; and it was observed, that if the statute could be held not to apply, the creditor must give good reasons why he delayed to seek in his own person the help of the court. And, subject probably to that observation, it seems, that the law remains as it was before the statute; and that a creditor may come (*p*) in under another creditor's bill for the general benefit of creditors, filed or prosecuted with his knowledge before the decree to account and report made, where his demand would not have been barred had he himself filed the bill, and where he comes in according to the decree and the course of the court (*q*). For it is thought to be but reasonable, where creditors come in under a decree in such a suit, to suppose that they were lying by, seeing that there was a suit in progress of which they could have the benefit, and it is impolitic to make a rule which would drive each creditor to begin a separate suit, or action, to recover his particular demand.

549. It is immaterial that the bill does not profess to be filed on behalf of creditors, that being but a matter of form; if the suit be so constituted as to admit of a creditor coming in under the decree and proving his demand, the want of that averment will not shut him out (*r*). A mortgagee's suit (*s*) for sale of the estate, not purporting to be on behalf of all the creditors, and a decree therein after the mortgagor's death directing accounts of his estate, is only contingently for the

(*p*) *Bermingham v. Burke*, 2 Jo. & Lat. 699; the learned author of which decision also states, that the case of *Sterndale v. Hankinson* is still law, both in England and Ireland, but to be cautiously applied since the statute. (*Sugd. R. P. S. 123.*)

(*q*) See *O'Kelly v. Bodkin*, 3 Ir.

Eq. R. 390; *Brown v. Lynch*, 4 Ir. *Eq. R. 316.*

(*r*) *O'Kelly v. Bodkin*, 2 Ir. *Eq. R. 369*; and see *Bennett v. Bernard*, 12 Ir. *Eq. R. 229.* And the observations there upon *Sterndale v. Hankinson*, *supra.*

(*s*) *Rankin v. Harwood*, 2 Ph. 22.

benefit of creditors, who have no present right to go in and prove under the decree.

550. The benefit of a suit cannot be claimed under this rule, against the statute, by a person who, although made a party to the suit, was not served and did not appear, and whose name was afterwards struck out (*t*).

551. In a case (*u*) in England since the statute, in which a bill was filed by a creditor on his own behalf only, making another creditor, who claimed a lien for a debt on certain papers, a defendant, and praying the usual accounts and administration, and that the lien claimed, *if any*, might be ascertained, and the amount paid according to priority; it was held, that this was not a suit of which the person claiming the lien could have the benefit as a creditor, against the Statute of Limitations; because, so far from his lien having been admitted, the bill prayed that the lien, if any, might be ascertained; and upon a petition by the claimant of the lien, praying an inquiry as to the amount due thereon, the court only directed a general inquiry as to incumbrancers; so that the claimant was nowhere treated as a creditor in the decree or otherwise in the proceedings, except in the Master's report, by which his debt was found to be due. This decision is doubted by a great authority (*x*), but stands, it is submitted, upon good reason. The prayer, that the lien, *if any*, might be ascertained, was certainly not an admission of the existence of the lien. It is like an offer to discharge a lien if it should be established, which does not bind if the lien be not established (*y*); and, in like manner, admission to an estate, subject to an equity of redemption, *if any*, is no acknowledgment of a mortgage title (*z*). Nor could the fact, that the debt was found due by the Master's report, amount to a recognition of its existence, for no inquiry was directed as to the particular debt; and it was this very

(*t*) O'Kelly v. Bodkin, 3 Ir. Eq. R. 390.

(*u*) Watson v. Birch, 15 Sim. 523.

(*x*) Sugd. R. P. S. 120.

(*y*) Pelly v. Wathen, 7 Hare, 352.

(*z*) Hardy v. Reeves, 4 Ves. 466; and see Bligh v. Benson, 7 Price, 205.

report which was in question, and was alleged to be wrong, by reason that the debt had been barred by the statute.

552. So long as the mortgagee is alone in receipt of the rents of the mortgaged estate, as if he be tenant for life of the estate, the statute does not run against the mortgage title; the interest is deemed to have been paid out of the rents in favour of the remainderman, who cannot allege that it was not paid for the purpose of setting up the statute. But it seems the court cannot assume that the interest was paid if the bill expressly state that the rents were insufficient for the purpose (*a*). The rule seems to be the same where the incumbrancer is tenant in common of the estate; for a tenant in common is entitled to redeem the whole estate, as against an incumbrancer, and, subject to account with his co-tenant, he is entitled to receive the whole rent (*b*) (1225).

553. Where tenant for life pays off a charge, though he take no steps for keeping it alive, it remains unmerged in favour of his personal representatives, notwithstanding the Statute of Limitations and the absence of part payment or acknowledgment; there being no assignable person liable to pay the charge, or who by the delay could be induced to suppose that the charge was merged; and the rent, out of which the interest was payable, being receivable by and belonging to the person entitled to the interest (*c*).

554. The judicial appointment of a receiver (597) of the encumbered estate does not prevent time from running against a stranger to the suit; but it does prevent it, in a court of equity, from running in his favour against the suitor; for the possession of the court is the suitor's possession, and against a person in possession time cannot run (*d*).

(*a*) *Wynne v. Styan*, 2 Ph. 303; (*c*) *Burrell v. Earl of Egremont*, 7
Lord Carbery v. Preston, 13 Ir. Eq. R. Beav. 205.
 455.

(*b*) *Wynne v. Styan*, *supra*.

(*d*) *Harrison v. Duignan*, 2 Dru. &
 War. 295; *Wrixon v. Vize*, 3 id. 104;
Dixon v. Gayfere, 17 Beav. 421.

555. Where money, which is liable for the payment of unsatisfied claims, has been paid over to persons as volunteers, in breach of trust, the statute does not bar the creditor's claim as against those persons, but an account may be directed of the monies paid to them (*e*).

556. The possession of the mortgagor is consistent with and not adverse to the rights of the mortgagee, except in case of renunciation of his rights by the latter, or under other special circumstances (*f*). But time runs under the Statute of Limitations against the mortgagee, although there be no adverse possession (*g*).

557. The operation of the statute 3 & 4 Will. 4, c. 27, s. 40, is prevented by payment of some part of the principal money, or some interest thereon, or by some acknowledgment of the right thereto given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; no action, suit or proceeding being allowed within twenty years after such payment or acknowledgment, or the last of them, if more than one.

In 3 & 4 Will. 4, c. 42, which provides (sect. 3), that all actions of covenant or debt, upon any bond or other specialty, or of debt upon any bond, or *scire facias* upon any recognizance, shall be commenced within twenty years after the cause of such action or suit, the saving clause (sect. 5) provides that if any acknowledgment shall have been made either by writing signed by *the party liable*, by virtue of the indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon, it shall be lawful for the person or persons entitled to such actions, to sue within twenty years after the acknowledgment, part payment, or part satisfaction, or within twenty years after the cessation of any disability.

(*e*) *Fordham v. Wallis*, 10 Hare, 231; 6 Nev. & M. 816.

17 Jur. 228.

(*g*) *Wrixon v. Vize*, 3 Drn. & War.

(*f*) *Doe v. Williams*, 5 A. & E. 291; 104, 121.

Under the statute of James 1 (*h*), which did not provide for acknowledgment by part payment, a payment out of personal estate would not keep alive a debt against realty which was also liable to pay it (*i*); for, except in cases of joint contract, one person cannot generally be bound by the admissions of another (*k*). Upon the same principle and authority, it was held, under the modern statute, that payment of interest by the devisee of the mortgagor, or receipt of rent by a creditor, in his character of incumbrancer on the real estate, ought not to preserve the debt against the debtor's personality (*l*).

558. It was, however, held before the passing of the statute 3 & 4 Will. 4, that if an equitable mortgagee enter into possession and receive the rents of the estate, the receipt ought *prima facie* to be taken as part payment of interest or principal, as the case may be (*m*); and it has been considered (*n*), that such a receipt or other part payment of the mortgage debt will keep alive against the statute the judgment or bond debt, by which the mortgage is collaterally secured. And although it has been determined under 3 & 4 Will. 4, c. 42, that the payment of interest by one devisee, upon whose estate a moiety of the testator's debts was charged, will not keep alive the remedy against the devisee under the same will of another estate, charged with the other moiety of the debts (*o*): yet as the words "the party liable" used in that statute must mean each or any of the persons liable, where there are more than one, the acknowledgment or payment by any one of several persons liable for the same debt, in respect of interests in the same estate, will preserve the remedy against the others. The payment, therefore, by a devisee for life, of interest on the testator's specialty debt for which the heirs are bound, will keep alive the right of action against the remain-

(*h*) 21 Jac. 1, c. 16.

(*i*) Putnam v. Bates, 3 Russ. 188.

(*k*) Atkins v. Tredgold, 2 B. & C. 23; Slater v. Lawson, 1 B. & Ad. 396.

(*l*) Fordham v. Wallis, 10 Hare, 217; 17 Jur. 228.

(*m*) Brocklehurst v. Jessop, 7 Sim. 438.

(*n*) Sugd. R. P. S. 128, and cases cited there; Dowling v. Ford, 11 M. & W. 329.

(*o*) Dickinson v. Teasdale, 1 De G., J. & S. 57; 9 Jur., N. S. 236.

derman (*p*), and so will payment by devisees in trust, under a will, against the beneficial devisee (*q*).

559. As to the nature of the acknowledgment required by sects. 40 and 42 of the statute, the latter of which clauses relates to arrears of rent and interest, it has been held (*r*) (and the principles of the decisions apply also to sect. 28) (**1201**), that the admission must have been made to the person entitled to make the demand [or his agent], and with a view, on the part of the person acknowledging, of making himself liable to the demand. Therefore, a letter written by an executor, seeking to throw the burden of the debt upon another person, was held not to be within the statute. But an admission made by answer or other proceeding in a suit will be a good acknowledgment to the person entitled, if he be a party, though not the plaintiff in the suit (*s*); but where he is not a party, it seems to be otherwise (*t*). The Master's report, however, being a judicial document, and he deriving his authority from the court, and not being the agent of the parties, has been held to be no acknowledgment within the statute of a judgment debt; especially as the person entitled to the debt was no party to the suit; though it has been thought (*u*), that the report itself, the debtor being a party to it, would give a new right to receive the money secured by the judgment, just as if the judgment itself had been revived.

560. The acknowledgment under these sections is to be made by the person by whom the money is payable, or his agent; in which respect they differ from sect. 28, under which no acknowledgment by an agent is valid (**1200**). In the case of an equitable lien, the person by whom the money is payable

(*p*) *Roddam v. Morley*, 1 De G. & J. 1; *Pears v. Laing*, L. R., 12 Eq. 41; and see *The Fitzmaurices*, In re, 15 Ir. Ch. R. 445.

(*q*) *Coope v. Cresswell*, L. R., 2 Eq. 106.

(*r*) *Holland v. Clark*, 1 Y. & C. C. C. 151.

(*s*) *Blair v. Nugent*, 3 Jo. & Lat. 658, 677.

(*t*) *Hill v. Stawell*, 2 Jebb & S. 389.

(*u*) Sugd. R. P. S. 131.

is understood to be the person claiming the land out of which the money is payable (*x*).

561. The payment on account of an annuity, of the dividends of a sum of stock which has been set apart to answer the annuity, is not a payment which, under sect. 40, will bar the annuitant from recovering the arrears. To create such a bar, there must have been no recognition of the annuity (*y*).

562. Where by a consent order in a foreclosure suit, in which the Statute of Limitations had been set up, a payment was made to the plaintiff in part discharge of his claim, it was held, that though the payment would have defeated the bar created by the statute as between adults, the rights of infants who were parties to the suit were not affected (*z*).

563. The words "the person by whom the same shall be payable," used in sect. 40 (and which apply there both to the making of a payment and the signing an acknowledgment (*a*)), have been applied to the mortgagor, so as to make payments of interest by his agent sufficient to prevent the statute from barring the demand of the mortgagee, as to estates included in his security, but which had been sold many years before by the mortgagor; and to the rents of which no recourse had been had for payment of interest (*b*). This decision appears at first sight to conflict with the construction put upon nearly similar words in 3 & 4 Will. 4, c. 42 (**1587**), by which the acknowledgment of the mortgagor was held to be unavailing to support the claim of the first mortgagee, to arrears of interest beyond the period limited by the statute, and to the detriment of puisné incumbrancers (*c*).

In the case of *Bolding v. Lane* the acknowledgment relied

(*x*) *Toft v. Stephenson*, 1 De G., M. & G. 28; *S. C.*, 5 id. 735; 15 Jur. 1187.

(*y*) *Ashwell's Will*, In re, Job. 112.

(*z*) *Thwaites v. McDonough*, 2 Ir. Eq. R. 97.

(*a*) *Chinnery v. Evans*, 11 H. L. C. 115.

(*b*) *Ibid.*

(*c*) *Bolding v. Lane*, 1 De G., J. & S. 122; 9 Jur., N. S. 506.

on did not (as was supposed by the learned judge who decided that case in the Court of Chancery, and who also took part in the decision of *Chinnery v. Evans*) consist of payment of interest by the mortgagor, but arose from a recital in a transfer of a puisné mortgage; though this circumstance has only a remote bearing upon the distinction between the cases: in each of which the rights of persons taking, subject to the first mortgage, were involved. In the one, the mortgagor's acknowledgment was, and, in the other, it was not, held sufficient to affect them. But if the decisions had been otherwise, the rights which the puisné incumbrancers had acquired in the latter case, by the neglect of the first mortgagee to obtain his interest, would have been taken from them for his benefit; whereas, in the former, the first incumbrancer, who was in no default, would have been deprived of his right in favour of persons who always held subject to it. The principle which reconciles the decisions appears to require that to make the acknowledgment sufficient under the statute, it must not only bind the person who makes it, but must not affect the existing rights of any other person in the estate, whether such rights were acquired by the original contract, or by the operation of the statute itself.

564. Payment of interest by a surety is sufficient; and it will be presumed, in the absence of evidence to the contrary, that the principal debtor was in default, and that it was the surety's duty to pay the interest (*d*). But it seems clear that payment of interest by a stranger (**1282**) would not be an acknowledgment within sect. 40 (*e*): though the heirs of the mortgagor have been held to be bound, by payments of interest made by a person, whose length of possession, if she were treated as a stranger, and not as the agent of the heirs, would be sufficient to bar their own right (*f*).

565. The acknowledgment must show that the debt is

(*d*) *Cann v. Taylor*, 1 F. & F. 651.

(*f*) *Ames v. Mannering*, 26 Beav.

(*c*) *Chinnery v. Evans*, 11 H. L. C. 583.

subsisting; a mere recital that a mortgage of the property has been executed, and that the latter is still vested in the mortgagee, is not sufficient: for the mortgagee may be in possession, and yet may have satisfied himself out of the rents (*g*).

566. The acknowledgment will be sufficient, if it be made by a trustee of the estate, whether he be a devisee in trust (*h*) of the debtor, or a trustee appointed by the court (*i*); just as the acknowledgment of an executor will keep alive a debt against all parties beneficially interested. And a letter (*k*), professedly written and signed by an amanuensis for the person acknowledging, and sworn to have been written according to his dictation, and to have been signed in his presence, has been held to be a good acknowledgment by an agent; though the agency might probably be established on less particular, though substantial, proof.

Where an acknowledgment is made by a person who fills a double character, as that of executor and beneficial devisee of the debtor, it is a general acknowledgment, and will not be applied to one character more than to the other, and the interest of the person making it as beneficial devisee will be affected (*l*); but if he be executor of one debtor, and be also a debtor individually, in respect of the same debt, an act done by him which he was bound to do in his individual character, and which amounts to an acknowledgment, will not be *primâ facie* considered to have been done as executor (*m*). He fills the place of two persons, and the question is, by whom the promise was made, and not what is the extent or effect of it.

567. An undisturbed possession for twenty years by the grantor of an annuity, and his representatives, of land charged

(*g*) *Howcutt v. Bonser*, 3 Exch. 491. 1187.

(*h*) *St. John v. Boughton*, 9 Sim. 219.

(*k*) *St. John v. Boughton*, *supra*.

(*l*) *Fordham v. Wallis*, 10 Hare, 231; 17 Jur. 228.

(*i*) *Toft v. Stephenson*, 1 De G., M. & G. 28; *S. C.*, 5 id. 735; 15 Jur.

(*m*) *Way v. Basset*, 5 Hare, 55.

with payment of the annuity, during which time the annuity has been punctually paid, but no written acknowledgment has been given, has been held (*n*) not to operate as a bar to the annuitant, though it seems to have been thought that the literal construction of the statute might have led to such a consequence: and, *à fortiori*, a mortgagee will not be barred by the punctual payment of his interest under the like circumstances (*o*).

568. The right to sue must have accrued during the disability, and the act gives no new equity in respect of a subsequent disability (*p*). So under the old law, if time began to run during the life of the ancestor, it continued against the infant heir (*q*); and, running during a woman's coverture, would continue after her marriage (*r*).

Where disability is relied on as an excuse for not coming to the court, the disability must be clearly stated. It is not enough to say generally, that there have been infancies, covertures or other disabilities, owing to which the plaintiff during part of the time has been unable to assert or prosecute his right (*s*). This was held under the old law in a case of redemption.

569. In a case (*t*) which came before him when Lord Chancellor of Ireland, Lord St. Leonards declined to give any opinion on the question whether the 25th sect. of 3 & 4 Will. 4, c. 27 (which provides that where any land or rent shall be vested in a trustee, upon any express trust, time shall run against the right of the *cestui que trust*, or those claiming through him, to sue the trustee or those claiming through him, to recover such land or rent, only from the time when the trust estate shall have been conveyed to a purchaser for valuable consideration, and then only as against such pur-

(*n*) *Francis v. Grover*, 5 Hare, 39.

(*o*) *Sugd. R. P. S.* 27, 29.

(*p*) *Goodall v. Skarratt*, 3 Drew.
216.

(*q*) *St. John v. Turner*, 2 Vern. 418.

(*r*) *Anon.*, 2 Atk. 333.

(*s*) *Blewitt v. Thomas*, 2 Ves. jun.
669.

(*t*) *Law v. Bagwell*, 4 D. & W. 398;
and see *Dillon v. Cruise*, 3 Ir. Eq. R.

81.

chaser and any person claiming through him), applies to the 40th and 42nd sections of the same act; and he thought the difficulty might be greater as to the latter section. But the Vice-Chancellor of England had already held (*u*), that section 40 had no operation where the relation of trustee and *cestui que trust* existed; and Lord St. Leonards himself afterwards held (*x*), with the concurrence of the Lords Justices, that the *cestui que trust* of an annuity, secured by a subsisting term in trustees, is entitled, notwithstanding section 42, to the whole arrears, so long as the trustees have the right to get possession by virtue of the legal estate vested in them. Upon the existence of this right also depends the decision in the case of *Young v. Lord Waterpark*. It will be observed, that the 24th section, to which by its position the 25th appears intended to be specially pointed, relates to the recovery of land or rent, but the 40th and 42nd to money and arrears, and interest of money, charged upon land or rent.

The 25th section applies to *cestuis que trust inter se*, where some have received to the exclusion of others, as well as between them and the trustee; its operation being to except where there is an express trust all cases which would otherwise have fallen within the general rule contained in sect. 24 (*y*).

570. Where (*z*) a debtor executed a legal mortgage and covenanted to pay the debt, and the mortgagee afterwards joined in postponing his debt to another creditor, to whom the estate was thereupon conveyed, in trust to sell and apply the purchase-money in payment of the trustee's debt, and then of the debt of the original mortgagee; and, soon after, the debtor by deed-poll assigned to the original mortgagee certain future property to secure the postponed debt and other debts;

(*u*) *Young v. Lord Waterpark*, 13 Sim. 204; 15 L. J. (Ch.) N. S. 63.

(*x*) *Cox v. Dolman*, 2 De G., M. & G. 592; see also *Francis v. Grover*, 5 Hare, 39; *Hughes v. Williams*, 3 Mac. & G. 683; *Gough v. Bult*, 16 Sim. 323; *Earl Mansfield v. Ogle*, 1 Jur., N. S. 414. And it makes no difference that the term is reversionary;

Snow v. Booth, 2 Jur., N. S. 37, 244; 2 K. & J. 132; 8 De G., M. & G. 69.

(*y*) *Knight v. Bowyer*, 23 Beav. 609; 2 De G. & J. 421; 3 Jur., N. S. 968; 4 id. 569.

(*z*) *Bennett v. Cooper*, 9 Beav. 252; and see *Dillon v. Cruise*, 3 Ir. Eq. R. 70; *Hunt v. Bateman*, 10 Ir. Eq. R. 360.

a bill filed by the original mortgagee to have the benefit of the deed-poll, more than twenty years after its date, but less than twenty years after the sale, under the trust, of the estate comprised in the original security, was held to be in good time; for the statute did not run against the plaintiff in respect of his original debt whilst the trust-deed was pending, and whilst he might expect to receive payment by means of it, and therefore he still had the benefit of the covenant in the original mortgage deed, to which the deed-poll was only a collateral security, remaining in force during the existence of the original debt.

It will, however, be remembered, that a scheduled incumbrancer, in a deed containing trusts for payment of the scheduled debts, but who is no party to the deed, does not (*a*) come within the description of a *cestui que trust* under an express trust for this purpose.

571. A charge of real estate with payment of debts, with a direction to raise sufficient by mortgage or otherwise, does not create an express trust (*b*); and the trust between vendor and purchaser is not an express trust within sect. 25, but constructive only; for, by sect. 40, twenty years bars every lien on land, but sect. 25 makes no length of time a bar (*c*). A subsisting term agreed to be assigned upon trust for the mortgagee is an express trust by virtue of the agreement, though no assignment was executed; and though the term was outstanding and satisfied at the date of the mortgage, the effect of the assignment will not be prevented by merger under 8 & 9 Vict. c. 112 (*d*).

The 25th section does not apply until the time when the party seeking the remedy himself becomes entitled to pos-

(*a*) *Law v. Bagwell*, 4 Dru. & War. 398; *Walwyn v. Coutts*, 3 Sim. 14; 3 Mer. 707; *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 R. & M. 451.

(*b*) *Dickinson v. Teasdale*, 1 De G., J. & S. 52; 9 Jur., N. S. 236.

(*c*) *Toft v. Stephenson*, 7 Hare, 1. But if the reason given were of any

value, the 25th section could have no effect at all upon the 40th; for not a lien only, but every kind of charge upon land, is *prima facie* barred after twenty years by the latter clause.

(*d*) *Shaw v. Johnson*, 1 Dr. & Sm. 412; 7 Jur., N. S. 1005.

session. A person entitled in remainder is, therefore, not bound by the statute, before the period when his right to possession accrues (*e*).

572. By the Judicature Acts, after 2nd November, 1875, no claim of a *cestui que trust*, against his trustee, for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations (*f*).

But, by the Real Property Limitation Act, 1874, after the 1st January, 1879, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust; or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust (*g*).

The remedy of the *cestui que trust* against the land will, therefore, be the same as if there were no trust, and his remedy against the trustee is as if there were no statute.

573. In every case of a concealed fraud the right of any person to sue (*h*) for the recovery of any land or rent, of which he, or any one claiming through him, may have been deprived by such fraud, is deemed to have first accrued when and not before such fraud shall, or with reasonable diligence might, have been discovered; saving, however, the rights of *bonâ fide* purchasers for valuable consideration, who have neither assisted in nor had notice of the fraud. But the rules of equity as to refusing relief to persons whose rights are not barred by the act, on the ground of acquiescence or otherwise, remain unaffected (*i*). It is conceived that the 26th section must have an application as extensive as that which relates to express trusts.

(*e*) *Thompson v. Simpson*, 1 Dru. & War. 459, 489.

(*f*) 36 & 37 Vict. c. 66, s. 25 (2);
37 & 38 Vict. c. 83, s. 2.

(*g*) Real Property Limitation Act,
1874, 37 & 38 Vict. c. 57, s. 10.

(*h*) 3 & 4 Will. 4, c. 27, s. 26.

(*i*) *Ibid.* s. 27.

574. By 3 & 4 Will. 4, c. 42 (*k*), all actions of covenant or debt upon any bond or specialty, and all actions of debt or scire facias upon any recognizance, must, subject to the savings in case of infancy or other disability, be commenced and sued within twenty years after the cause of action; provided, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such specialty or recognizance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being due thereon, the action may be brought within twenty years after such acknowledgment, or within twenty years after the termination of disability or absence beyond seas existing at the time of the acknowledgment (*l*). Under this statute, a recital in a conveyance made by the owner of the mortgaged property within twenty years before action brought, to the effect that the principal sum was due, and that all interest was paid, with a covenant by the assignee to pay principal and interest, was held to be sufficient evidence of payment of interest to take the case out of the statute; and subsequent payment of interest by the assignee was held to be sufficient within the statute: for even if it were necessary that the payment should be made by the party liable or his agent, the assignee of the equity of redemption, who covenanted to pay the interest, was considered to be sufficiently an agent for the purpose. And it was intimated on the construction of the act with sect. 40 of 3 & 4 Will. 4, c. 27, that though an action of covenant or debt on a mortgage deed, or of debt on a mortgage bond, would not be taken out of the statute unless the acknowledgment were made *to* the person entitled or his agent, yet on an ordinary bond or covenant, an acknowledgment by the person liable or his agent would be sufficient, though not made to the person entitled or his agent (*m*).

575. The Mercantile Law Amendment Act (*n*) declares,

(*k*) Sect. 3.

(*l*) Sects. 3, 4, 5.

(*m*) *Forsyth v. Bristowe*, 8 Exch.

716; 1 C. L. R. 262.

(*n*) 19 & 20 Vict. c. 97, s. 14.

with reference to sect. 3 of 3 & 4 Will. 4, c. 42, and other acts, that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

576. Persons who have neglected to avail themselves of the Statute of Limitations, and who have been held liable to debts, which the statute, if it had been set up, would have barred, cannot insist upon any right of contribution as against other parties, who, by means of the statute, have repelled the demand against them. Nor will the right to marshal assets be, in general, kept on foot for the purpose of indirectly giving a creditor a right to come upon real estate, after his remedy against it has been otherwise barred by the statute (*o*); though under special circumstances, as where a suit had miscarried by no fault of the plaintiff, but by a general misapprehension of the rights of the parties, and the bill had been properly framed for marshalling, a simple contract creditor was held, by virtue of the equity of marshalling, not to be barred by the statute (*p*).

Of the Evidence of the Security.

577. The mortgagee can have no relief, unless the mortgage deed or security be admitted or proved (*q*).

Like other instruments, in the establishing of which proof of the handwriting of the person subscribing is necessary, it may be proved at the hearing, where its execution is not controverted, though its validity may be in question (*r*), either

(*o*) *Fordham v. Wallis*, 10 Hare, C. 211; and see 1 Jo. & Lat. 534, 217; 17 Jur. 228.

(*q*) 18 Beav. 304.

(*p*) *Vickers v. Oliver*, 1 Y. & C. C.

(*r*) *Booth v. Creswicke*, 8 Jur. 323.

vivâ voce or by affidavit (*s*). But it cannot be proved as an exhibit at the hearing, if it be impeached for fraud, especially if one of the attesting witnesses be alleged to have been concerned in the fraud by which the execution of the deed was obtained (*t*). Where the execution and the payment of the consideration are contested by a person who is not a party to the deed, it must be proved by the witness, though the mortgagor admit the execution, in order that there may be an opportunity for cross-examination (*u*).

If the security be attested by one witness only, who afterwards becomes entitled to the mortgage, proof of his handwriting, by a third person, will be sufficient evidence of the execution of the security (*x*). In case of the loss of the security it may be established by secondary evidence, and by proof of its existence as a security (*y*).

578. The payment of the consideration money need not generally be proved, unless the fact be put in issue on the pleadings, the security being sufficient evidence of such payment (*z*); but a person claiming to be transferee of an equitable mortgage, must not only prove payment of the debt, but that it was his own money, or that he was to stand in the place of the original mortgagee (*a*). In the case of a security given by a client to his attorney, strict evidence of the payment of the money has been required in Ireland (*b*). In England it appears that receipts are admitted as *primâ facie* evidence of advances, but where the security is for the balance found due on a settled account, the solicitor must be prepared with evidence that the

(*s*) 1 Dan. Pr. 816, ed. 4; 43rd Ord. Aug. 1841; Rowland v. Sturgis, 2 Hare, 520: but an order must still be obtained to prove at the hearing (Clare v. Wood, 1 Hare, 314). As to the proof where the deed is not denied, but no replication (see Rowland v. Sturgis, 2 Hare, 520; Chalk v. Raine, 7 Hare, 393; Jones v. Griffith, 14 Sim. 262). The evidence of the mortgagor himself will not be allowed to be substituted for that of the attesting witness. (Whyman v. Gath, 1 C. L. R. 482.)

(*t*) Hitchcock v. Carew, Kay, xiv.

(*u*) Leigh v. Lloyd, 35 Beav. 455.

(*x*) Inman v. Parsons, 4 Mad. 271.

(*y*) Abington v. Green, 14 W. R. 852; Heath v. Crealock, L. R., 10 Ch. 22.

(*z*) Minot v. Eaton, 4 L. J., Ch. 184.

(*a*) Pandoorung, &c. v. Balkrishan, &c., 2 Moo. F. I. 60.

(*b*) Lawless v. Mansfield, 1 Dru. & War. 557, 605; and see Carter v. Palmer, 1 Dru. & Wal. 722.

client was not under pressure or undue influence, and that the account was stated upon the production of books or other proper evidence, and under circumstances which enabled the client to judge of the result of the transactions between himself and the solicitor (*c*); and where the security does not express the real nature of the transaction, it must also be supported by extrinsic evidence (*d*). And where there is room for the exercise of undue influence, as if a security be obtained by a person without consideration from a woman with whom he is under a contract of marriage, he must show that the transaction was fair and not procured by false representation. But this is only as between the parties giving and taking the benefit of the transaction; for no such duty is cast upon a purchaser of the security for valuable consideration, not privy to the fraud (*e*).

579. The question whether the mortgage ever subsisted as a security, where from the circumstances under which it was executed (*f*), the alleged lunacy of the mortgagor (*g*), or other matters, doubts have arisen on that point, or where the security is not proved on the one, or admitted on the other side (*h*), may be ascertained by inquiry, or by a jury. Declarations by a mortgagee who has made a prior voluntary settlement will not be admitted to prove advances by the mortgagee, so as to affect the interests of persons claiming under the settlement (*i*).

Where the lunacy of the mortgagor, prior to the execution of the mortgage deed, was set up by the defendant in a foreclosure suit, it was held that he was entitled to have its validity tried by an issue or by ejectment, without filing a cross bill to set it aside, although he had not cross-examined the attesting witnesses by whom it had been proved (*h*).

(*c*) *Judd v. Ollard*, 5 Jur., N. S. 755; 2 Y. & C. C. C. 199; *Wynne v. Styan*, *Davies v. Parry*, id. 759; 1 Gif. 174; 2 Ph. 303.
Morgan v. Higgins, 1 Gif. 270; 5 Jur., N. S. 236.

(*d*) Per Lord Eldon in *Lewes v. Morgan*, 5 Pr. 143; 4 Dow, 53.

(*e*) *Cobbett v. Brock*, 20 Beav. 524; and see *Cooke v. Lamotte*, 15 Beav. 234; *Hoghton v. Hoghton*, id. 278.

(*f*) *Melland v. Gray*, 5 Jur. 1004;

(*g*) *Snook v. Watts*, 11 Beav. 105.

(*h*) *Guardner v. Boucher*, 13 Beav. 68.

(*i*) *Doe d. Sweetland v. Webber*, 1 A. & E. 733.

(*k*) *Jacobs v. Richards*, 18 Beav. 300; 18 Jur. 527; 5 De G., M. & G. 55; 23 L. J., Ch. 557.

580. It is, however, to be remembered, that to invalidate a contract by a person suspected or found to be a lunatic, it is not enough (*l*) to show lunacy at the date of the contract; it must also be shown that the grantee knew, and took advantage of, the grantor's state of mind. And if a mortgage be made without notice of the lunacy, and the money were duly paid (as to which, if there be any suspicious circumstances, the court will direct an inquiry), the security will be ordered to stand for the amount advanced, though lunacy, at the execution of the conveyance, be admitted at the hearing (*m*). It is immaterial in such cases whether the suit be by the mortgagee for foreclosure, or by persons claiming under the mortgagor to set aside the deed (*n*). And where an illegal agreement has been added to a security, a decree of foreclosure may be made upon nonpayment of what shall be found due on the original mortgage, if general relief be prayed; though the suit will be dismissed, so far as it seeks relief founded on the illegal agreement (*o*). If a suit to deliver up securities for fraud and for further relief fails, the court does not decree redemption (*p*).

581. In suits by the first mortgagee, if the plaintiff prove the subsequent incumbrances, he may at once have a decree for redemption or foreclosure against the owners of them, according to their priorities. But if the subsequent incumbrances be not proved nor admitted, or if their priorities be disputed, the course is to direct an inquiry upon these questions (*q*). And there will be no decree, until the securities have been established, and the priorities of the respective incumbrancers inquired into and settled (*r*); for the incumbrancers cannot be excluded or postponed, without a declaration of their rights by the decree.

(*l*) Neill v. Morley, 9 Ves. 478; see also Price v. Berrington, 3 Mac. & G. 486; Baxter v. Earl of Portsmouth, 5 B. & C. 170.

(*m*) Kirkwall v. Flight, 3 W. R. 529; Campbell v. Hooper, 1 Jur., N. S. 670; 3 Sm. & G. 153.

(*n*) Campbell v. Hooper, *supra*.

(*o*) Powney v. Blomberg, 14 Sim. 179.

(*p*) Johnson v. Fesenmeyer, 25 Beav. 88; 3 De G. & J. 13.

(*q*) Gardner v. Boucher, 18 Beav. 68.

(*r*) Duberly v. Day, 14 Beav. 9.

CHAPTER V. PART 2.—OF THE PERSONAL REMEDY AGAINST THE DEBTOR.

582. The principal secured by the mortgage and the interest thereon are distinct debts, and may be separately recovered (*s*). And upon the breach of an absolute covenant for payment of the debt on a certain day, the mortgagee may maintain an action either of debt or on the covenant, whether the covenantor be principal or surety (*t*); but on the covenant only, where, as in the case of an annuity charged on land, the liability of the covenantor does not arise until failure in payment by the *terre tenant* (*u*); or where the covenant is not direct but collateral, as that the covenantor or another will pay (*x*); or where the qualified form of the covenant implies that there is no personal contract for repayment, upon which an action can be brought: as where the covenantor, borrowing in the character of a trustee under a will, covenants for repayment out of money coming to his hands as trustee, from the mortgaged lands, or from the personal estate of the testator (*y*) (1114).

583. A covenant for payment of the mortgaged debt will generally be implied, if the deed contain a stipulation for payment on a certain day (*z*). But if, as it sometimes happens in a mortgage of public works, the money be simply borrowed on the security of the property or undertaking and duties, without preference between creditors in respect of priority of advances, and the trustees are under no obligation to set aside part of the money received towards keeping down the interest, so as to give the creditors a *legal* right to insist on payment; or if there be a special provision for payment of the debt inconsistent with

(*s*) *Dickenson v. Harrison*, 4 Pr. 282.

(*t*) *Evans v. Jones*, 5 M. & W. 295; see *Barber v. Butcher*, 8 Q. B. 863.

(*u*) *Randall v. Rigby*, 4 M. & W. 130.

(*x*) *Harrison v. Matthews*, 10 M. & W. 768.

(*y*) *Matthews v. Blackmore*, 1 H. & N. 762. See *Anglo-California, &c. Co.*, 16 W. R. 245, in the liquidation of

which it was held that a mortgagee, under such circumstances, and the shares being fully paid up, could not require a call to be made.

(*z*) *Hart v. Eastern Union Railway Co.*, 7 Exch. 246; 8 id. 116; 14 Jur. 89; and see the provision to that effect in sect. 50 of the Companies Clauses Act (8 & 9 Vict. c. 16).

a right in the creditors to demand immediate payment, the interest is in effect merely payable out of the rates and duties ; and the terms of the contract are satisfied by giving the lenders a claim against the undertaking, without a right to sue the corporation, notwithstanding a provision for payment of the interest at a fixed time. In the absence of a covenant for payment no action will lie in such a case for principal or interest, nor can the creditor compel the trustees by mandamus to pay the interest. The creditor can only enforce his rights as mortgagor of tolls against the undertaking, or by determining the possession of the tolls by the trustees (*a*). It is different where the creditors are holders of bonds, though by virtue of them they have a lien on the monies arising under the act in proportion to their advances, as if mortgages without priority had been granted. The lien is then an additional security only, and every bondholder may sue on his own bond, because the company may have other property to answer his demand (*b*).

584. A covenant for payment will be implied by an admission, coupled with an agreement, to execute a security which would create a specialty debt, or even (*c*) by a mere admission in a deed, of liability, provided it do not appear that it was not the object of the deed to make the debtor liable on covenant. If the deed were executed for the purpose of creating a security for the debt by other means, and the debt were referred to only for ascertaining the amount to be secured, or otherwise for a collateral purpose, as by way of recital in an appointment of new trustees, no covenant will be implied, though the deed contain an admission or acknowledgment of the debt (*d*).

585. Where the mortgage contains no covenant for pay-

(*a*) *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C. 433 ; 4 Scott, 182 ; *Pardoe v. Price*, 11 M. & W. 427 ; 13 id. 267 ; 14 L. J. (N. S.) Exch. 212 ; *The Queen v. Trustees of Dalby, &c. Road*, 22 L. J. (N. S.) Q. B. 164 ; 17 Jur. 734 ; *Preston v. Corporation of Great Yarmouth*, L. R., 7 Ch. 655. See also 16 M. & W. 451.

(*b*) *Hill v. Manchester, &c. Waterworks Co.*, 2 B. & Ad. 544.

(*c*) *Saunders v. Milsome*, L. R., 2 Eq. 573.

(*d*) *Courtney v. Taylor*, 7 Scott, N. R. 749 ; 6 Man. & G. 851 ; *Marryatt v. Marryatt*, 28 Beav. 224 ; *Isaacson v. Harwood*, L. R., 3 Ch. 225.

ment, the mortgagee may sue at law either in assumpsit or in debt, if the security be collateral to the debt, and was not taken in satisfaction of an existing debt; for if it have been so taken the contract will have merged in the security, which is of a higher nature; as under like circumstances the remedy on simple contract will merge in a bond or covenant (*e*) (1328).

586. Where the covenant for payment is only personal, a legatee of the debt cannot sue on the covenant in his own name, because such a covenant is not assignable; nor can an assignee sue in respect of a breach of the covenant which happened before his own time (*f*).

587. To a plea of payment in an action by a mortgagee on the covenant, a recital in a subsequent mortgage made to the same mortgagee, by a purchaser from the mortgagor, that the purchaser had agreed to convey the property to the mortgagee free from incumbrances, is a conclusive support, unless the recital be rebutted by the strongest evidence (*g*).

588. Where the mortgagor of a policy of insurance, the insurers being the mortgagees, covenants with them to keep up the policy, or in default that the insurers may pay and add the premiums to the mortgage debt, but there is no covenant to repay them the premiums; the mortgagees in an action against the mortgagor for breach of the covenant to keep up the policy, are entitled only to nominal damages, the addition of the premiums to the debt being the remedy provided; but under a covenant to repay, the amount paid would have been given as damages (*h*).

It seems that a pledge of a policy of insurance upon a ship gives the pledgee an implied authority to sue on the policy in the name of the insured (*i*).

(*e*) *Yates v. Aston*, 4 Q. B. 182;
Price v. Moulton, 10 C. B. R. 561. See
Holmes v. Bell, 3 Man. & G. 213; 3
Scott, N. R. 479; *Norfolk Railway Co.*
v. M'Namara, 3 Exch. 628.

(*f*) *Canham v. Rust*, 2 Moore, 164;

8 Taunt. 227.

(*g*) *Jones v. Williams*, 2 Stark. 52.

(*h*) *Brown v. Price*, 4 Jur., N. S.
 882.

(*i*) *Jardine v. Leathley*, 9 Jur., N. S.
 1035; 3 B. & S. 790.

589. Although the receipt indorsed on a mortgage to a benefit building society vacates the mortgage by force of the statute (6 & 7 Will. 4, c. 32, s. 5), a covenant in the deed, for payment of the subscriptions due to the society, is not extinguished; and though the deed be required to be given up, a copy of it may be preserved for the purposes of the covenant (*k*) (1720).

590. The pawnee of stock, or of an ordinary chattel, may also bring debt or assumpsit against the pawnor, whether the pawn were effected by himself or his agent, under an express or implied authority to recover the sum due, unless there be a special agreement that the pledge only shall be liable; and he may recover without returning the pledge, for which the debtor must bring trover (*l*). If in consequence of the wrongful conversion of the pawn by the pawnee, the pawnor has recovered the value of it by action, the debt remains, unless it was deducted in the action (*m*). So where the pawn being of a perishable nature, and no time for redemption limited, the pledgor stays till it is perished and spoilt, there being no default in the pledgee, he shall have debt for his money, and the other no remedy for his pawn (*n*).

(*k*) *Farmer v. Smith*, 4 H. & N. 196; 5 Jur., N. S. 133, n. The decision covers the corresponding provision of the Friendly Societies Act, 1875, c. 60, s. 16 (7).

(*l*) *South Sea Co. v. Duncomb*, 2

Str. 919; *Lawton v. Newland*, 2 Stark. 72. Per Holt, C. J., 12 Mod. 564.

(*m*) *Story*, Bailments, § 315.

(*n*) Per Fleming, C. J., *Ratcliff v. Davis*, Yelv. 178.



CHAPTER V. PART 3.—OF THE APPOINTMENT OF A RECEIVER.

- 591.** *Of the Appointment of a Receiver by the Parties.*
- 597.** *Of the Judicial Appointment of a Receiver.*
- 603.** *Of the Nature of the Appointment.*
- 605.** *In whose favour and against whom the Receiver may be appointed.*
- 633.** *Of what Property a Receiver may be appointed.*
- 639.** *At what Stage of the Action the Receiver may be appointed.*
- 641.** *Of the Persons who may be appointed.*
- 642.** *Of the Authority of the Receiver.*
- 659.** *Of his Right to apply to the Court.*
- 660.** *Of his Possession.*
- 667.** *Of his Expenditure.*
- 669.** *Of his Liability.*
- 688.** *Of his Allowances.*
- 693.** *Of passing his Accounts.*
- 695.** *Of the Payment of Balances by the Receiver, his Representatives and Sureties, and of the Liability to Interest.*
- 705.** *Of the Discharge of the Receiver.*

591. The security sometimes contains an appointment of, or a power for the mortgagee to appoint, a person to be receiver or receiver and manager of the mortgaged property, in order to secure to the mortgagee the payment of his interest out of the rents and profits. And a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of hereditaments of any tenure upon which any principal money is secured or charged by deed, or over any interest therein, may, by statute (*a*), be exercised (unless the power be negatived by express declaration in the security and subject to any variations or limitations therein contained) by the person to whom such money shall for the time being be payable, his executors, administrators or assigns, at any time after the expiration of one year from the time when such principal money shall have become payable according to the terms of the deed, or after any interest thereon shall have

(*a*) 23 & 24 Vict. c. 145, ss. 11, 32. Applicable "only to mortgages or charges made to secure money advanced or to be advanced by way of loan or to secure an existing or future debt."—Sect. 24.

been in arrear for six months, or after any omission to pay any premiums on any insurance, which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge.

592. Any person entitled to appoint or obtain the appointment of a receiver may appoint any person or persons who may have been named in the deed of charge for that purpose, or any one of them, to be receiver or receivers; or if no person be so named may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require him or them to appoint a fit and proper person as receiver; and if no such appointment be made within ten days after such requisition, then the person entitled to appoint may in writing appoint any person he may think fit (*b*).

593. Every receiver appointed as aforesaid is deemed to be the agent of the person entitled to the property subject to the charge, who is to be solely responsible for his acts or defaults unless otherwise provided for in the charge (*c*). And the receiver shall have power to demand, recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed a receiver, by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of (*d*).

The receiver may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time (*e*). And the receiver may retain out of the money received by him, in lieu of all costs, charges and expenses, such a commission not exceeding 5 per cent. on the gross amount of all money received by him as shall be

(*b*) 23 & 24 Vict. c. 145, s. 17.

(*c*) Sect. 18.

(*d*) Sect. 19.

(*e*) Sect. 20.

specified in his appointment, and if no amount shall be so specified, then 5 per cent. on such gross amount (*f*).

594. The receiver shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge, whether affixed to the freehold or not, which is in its nature insurable (*g*). And shall pay and apply all the money received by him, in the first place, in the discharge of all taxes, rates and assessments whatsoever, and in payment of his commission, and of the insurance premiums, if any, and in the next place in payment of all the interest accruing in respect of any principal money then charged on the property over which he is receiver, or any part thereof; and shall pay the residue to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns (*h*).

595. The receiver is the agent of the mortgagor (*i*), as well where he is appointed by the parties as under the act; and in the former case his powers are usually clearly defined by the instrument of appointment. And where a person is appointed to receive the profits of the estate on behalf of the mortgagee, and the mortgagor is afterwards allowed to receive them, the mortgagee's rights are not affected except as to later incumbrancers of whose claims he had notice (*k*).

596. A receiver jointly appointed by the mortgagor and the mortgagee to be the agent and attorney of the former, and to receive rents, bring ejectments and actions, give notices to quit, grant leases and do other matters as effectually as the mortgagors, their executors, administrators or assigns could

(*f*) 23 & 24 Vict. c. 145, s. 21.

(*g*) Sect. 22.

(*h*) Sect. 23.

(*i*) *Jefferys v. Dickson*, L. R., 1 Ch. 183; 2 Dav. Conv. 566, ed. 2; Law

v. Glenn, per Rolt, L. J., L. R., 2 Ch. 641.

(*k*) *Juggeewundas Keeka Shah v. Ramdas Brijbookundas*, 2 Moo. Ind. App. 487.

have done, if the deed had not been executed, has authority to demand possession of a tenant under 4 Geo. 2, c. 28, s. 1, so as to make him liable in double value for holding over (*l*). And a receiver under the Court, acting under the usual order, is invested with the like power (*m*).

Of the Judicial Appointment of a Receiver.

597. Under certain circumstances, and on the application of some or one of the parties interested in the incumbered estate, but not of a stranger (*n*), the court will appoint a receiver, who shall get in and take charge of the outstanding parts, and rents and profits, and see to the management of the estate, applying the monies received according to the directions of the court, and accounting to the court for such application.

598. A receiver may be appointed by interlocutory order (*o*), but an action must (*p*) be first commenced, and must be properly constituted (*q*); for the account ought to proceed upon such a record as will enable the court to determine who is to take the fund, which the appointment of a receiver shall have caused to be brought into court. Where the object of the suit was merely the protection of the property by means of a receiver, pending litigation in the Ecclesiastical Court, it was held that discovery ought not to be sought upon other matters (*r*). And as it is not necessary or proper to bring such a suit to a hearing (*s*), an application to dismiss for want of prosecution has been refused with costs (*t*). The application may be made to the court or a judge by any party, and if made by the plaintiff may be *ex parte* or with notice, and if by any other party then on

(*l*) *Poole v. Warren*, 3 Nev. & P. 693; 8 Ad. & El. 582.

(*m*) *Wilkinson v. Colley*, Burr. 2694.

(*n*) *A.-G. v. Day*, 2 Mad. 246.

(*o*) Judicature Act, 1873, s. 25 (8).

(*p*) *Anon.*, 1 Atk. 578; *Mountford, Exp.*, 15 Ves. 445. See, however, *Pitcher v. Helliar*, 2 Dick. 580.

(*q*) *Gray v. Chaplin*, 2 Russ. 126, 147.

(*r*) *Wood v. Hitchings*, 3 Beav. 504; and see *De Feucheres v. Dawes*, 5 Beav. 110.

(*s*) *Anderson v. Guichard*, 9 Haré, 275; *Barton v. Rock*, 22 Beav. 81, 376.

(*t*) *Edwards v. Edwards*, 17 Jur. 826.

notice to the plaintiff and at any time after appearance by the applicant (*u*).

599. The court is unwilling to disturb an appointment which has once been made, and will not do so unless the person chosen be shown to be unfit, or upon a mere question of the relative fitness of the competitors for the office (*x*).

A reference has been granted (*y*) to approve of a person to succeed the consignee of a West India estate in the event of his death, he being in a dangerous state of health; but this was done unwillingly, because the person chosen might cease to be a proper person before the commencement of his office. The order seems to have been made only on the consideration that the point must come before the court again upon the report; and the change of practice in this respect makes it probable that no such order would now be made.

600. The receiver is required to give security (by himself and two or more sureties (*z*)) duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, or to be answerable for what he shall receive in respect of the personal estate which he is to get in, and to account for and pay the same respectively as the court shall direct; and a different mode of giving security, as, for instance, by the assignment of a mortgage, is improper (*a*). The security is generally for double the annual rental to be got in (*b*); and where debts or outstanding estate are to be got in, security is given to the full, or something beyond the full, amount which is ordered or expected to be received (*c*). The

(*u*) Judicature Act, 1875, Ord. LII. r. 4.

(*x*) *Crenze v. Bishop of London*, 2 Bro. C. C. 253; *Thomas v. Dawkins*, 1 Ves. jun. 452; *Bowersbank v. Colasseau*, 3 Ves. 164; *Anon.*, id. 515; *Tharpe v. Tharpe*, 12 Ves. 317; *Wynne v. Lord Newborough*, 15 Ves. 283.

(*y*) *Forbes v. Hammond*, 1 Jac. & W. 88.

(*z*) Set. ed. 2, 533; ed. 3, 1007; XXIV. Cons. Ord. s. 1.

(*a*) *Mead v. Lord Orrery*, 3 Atk. 235; 13th Order, 16th Oct. 1852.

(*b*) Set. ed. 2, 533; ed. 3, 1007.

(*c*) The practice may depend in some measure upon the particular circumstances. Where the property was very large, a comparatively small security has been required, on the ground

receiver may also be restricted from getting in the principal of mortgage debts (*d*), that the amount of the security to be given may be lessened ; or, with the same object, part of the estate may be ordered to be brought into court for safe custody (*e*) ; and the like has been done in the case of the committee of a lunatic ; a direction being however added, that such securities as were of an objectionable kind should be called in (*f*).

601. The court will not generally dispense with sureties, even by consent of the parties interested (*g*). But if they, being competent to consent, will appoint a receiver of their own authority, the court will allow him to act without finding sureties (*h*). This course has been followed where (*i*) the deviser of the estate had himself appointed a receiver by his will, stating that he intended by the appointment to give him a pecuniary benefit. And even where all parties were not competent to consent, the circumstance that the receiver had been employed by the testator to manage the estate, was held to be a reason for dispensing with security (*h*) ; but this seems to go somewhat beyond the modern decisions.

The court also sometimes dispenses with security, where no salary is given to the receiver (*l*).

602. Where a receiver entered into the usual recognizances with sureties, one of whom procured himself to be discharged, and a fresh recognizance was entered into ; the time for inrolling the latter having elapsed, it was ordered to be entered *nunc pro tunc* (*m*). But, in a like case, it was added that the inrolment should not take effect, if there were any intermediate purchaser

that the outgoings being considerable, the receiver would not be likely to have much money in hand.

(*d*) *Bather v. Kearsley*, ex relatione Mr. J. W. HAWKINS.

(*e*) *Poole v. Wood*, Set., ed. 2, 533.

(*f*) *Re Eagle*, 2 Ph. 201.

(*g*) *Manners v. Furze*, 11 Beav. 30 ;
Tylee v. Tylee, 17 Beav. 583.

(*h*) *Ridout v. Earl of Plymouth*, 1 Dick. 68 ; *Carlisle v. Carlisle*, 1761, cited there ; *Manners v. Furze*, 11 Beav. 30.

(*i*) *Hibbert v. Hibbert*, 3 Mer. 681.

(*k*) *Carlisle v. Berkley*, Amb. 599.

(*l*) *Gardner v. Blane*, 1 Hare, 381.

(*m*) *Vaughan v. Vaughan*, 1 Dick. 90.

or incumbrancer for valuable consideration of the cognizor's lands, but from the time of enrolment (*n*) (982).

Of the Nature of the Appointment.

603. The appointment, which is a matter of discretion to be governed by the whole circumstances of the case (*o*), is made in the first place for the protection of the estate; the court upon the application will not decide, and the appointment does not affect, the ultimate rights of the parties to the suit (*p*). Nor does it affect the operation of the Statute of Limitations: for otherwise minors would suffer by the putting of the property under the protection of the court (*q*).

604. The appointment is also for the benefit of the incumbrancers (*r*), that they may not be injured by the act of the court in taking possession of the fund to which they were entitled to resort for payment of their interest. It is not, however, absolutely for their benefit without their own interference, but only as far as it is expressed to be so, and as they choose to avail themselves of it (*s*). Therefore if an incumbrancer omit to apply for rents, which have been paid into court by the receiver during the minority of an infant tenant in tail, the latter may take them when he comes of age, though the incumbrancer's interest be in arrear; for by his omission to apply, it is presumed that he was satisfied with his security, both for principal and interest: and as he may suffer the interest to run in arrear when the estate is not in the possession of the court, so it may be when there is a receiver. The court neither forces payment upon him, nor sets apart any part of the profits to answer unpaid interest. In like manner, if the mortgagee of a term have suffered the receiver to pay the surplus rents into court, and the term expire, the

(*n*) *Blois v. Betts*, 1 Dick. 336.

(*o*) *Owen v. Homan*, 8 Mac. & G. 412, per Lord Truro; *Greville v. Fleming*, 2 Jo. & Lat. 339.

(*p*) *Skip v. Harwood*, 3 Atk. 564; *Blakeney v. Dufaur*, 15 Beav. 40.

(*q*) Per Lord Hardwicke, 1 Atk. 15;

Harrison v. Duignan, 2 Dru. & War. 295; *Hunt v. Bateman*, 10 Ir. Eq. R. 377-8.

(*r*) *Bainbrigg v. Blair*, 3 Beav. 421.

(*s*) *Gresley v. Adderley*, 1 Sw. 579; *Bertie v. Lord Abingdon*, 3 Mer. 560.

heir will have the benefit (*t*) ; the mortgagee being in the same position as a mortgagee in fee, who is entitled only to such rents as accrue during his possession (1524) ; which it seems may date from the time of his application for the discharge of the receiver (*u*).

In whose favour and against whom the Receiver may be appointed.

605. Before the existence of the statutory right above referred to, the remedy of the legal mortgagee was to take possession, and not to come for a receiver, which the court would not grant him when he was out of possession, even under circumstances which would entitle him to a receiver if he had taken possession (*x*). And though the exercise of the legal right might be obstructed by difficulties, it did not follow that the equitable remedy would be granted (*y*). Upon the same principle a receiver will be denied to an incumbrancer in whom or in whose trustee powers of entry and distress are vested, either by the terms of the security or by the stat. 4 Geo. 2, c. 28, s. 5; unless, either from the insufficiency of the rents, the greatness of the arrears, or other circumstances, the powers would not give a sufficient remedy (*z*) (496). A receiver has, however, been granted in favour of a mortgagee of the legal estate, where the mortgagor, being a surety whose estate was not made liable until the principal's estate should prove insufficient, the insufficiency was denied in equity, and if set up as a defence to an action of ejectment would have led to the trial of a question of accounts at law (*a*). The same has been done in Ireland in favour of a mortgagee who has made advances to preserve the estate from eviction, notwithstanding

(*t*) *Gresley v. Adderley*, 1 Sw. 578.

(*u*) *Thomas v. Brigstocke*, 4 Russ. 64.

(*x*) *Berney v. Sewell*, 1 J. & W. 647; *Sturch v. Young*, 5 Beav. 557; *Cox v. Champneys*, Jac. 576; *Drought v. Percival*, 2 Mol. 502.

(*y*) *Cremen v. Hawkes*, 2 Jo. & Lat. 674.

(*z*) *Champernown v. Gibbs*, 2 Vern. 382; *Buxton v. Monkhouse*, G. Coop. 41; *Cupit v. Jackson*, 13 Pr. 721; *Sollory v. Leaver*, L. R., 9 Eq. 22; *Kelsey v. Kelsey*, 17 Eq. 495; but see *Foster v. Foster*, 2 Vern. 386; *Manly v. Hawkins*, 1 Dr. & Wal. 363.

(*a*) *Ackland v. Gravener*, 31 Beav. 483.

regular payment of interest (*b*); and also under the powers of the Judicature Act, 1873, s. 25 (8), over the whole of estates of which the plaintiff was in part legal and in part equitable mortgagee, without prejudice to the right of the prior incumbrancers to take possession (*c*) (**607, 612**).

606. A *puisné* mortgagee or other equitable incumbrancer is generally entitled to a receiver (*d*), provided the court be satisfied of the existence of the equitable right in the applicant (*e*); and the appointment may be made for the purpose of keeping down the interest, even though the applicant be unable at the time to enforce the usual mortgagee's remedies, as if (*f*) he have covenanted not to call in the mortgage debt during a certain time; and though by the transaction itself the security gave the creditor no right to be considered as a mortgagee of the estate, but only made the rents a fund for payment of interest and of the premiums upon a policy of insurance, out of the produce of which the principal was to be paid (*g*).

607. This right of the equitable incumbrancer is, however, subject to the general principle, that its exercise must be without prejudice to the prior legal incumbrancer. Therefore, *First*. If such an incumbrancer, to whom something is due, whether his priority be original or acquired subsequently, be actually in possession, no receiver will be appointed (*h*). *Second*. If there be any such incumbrancer who is not in possession, the receiver will be appointed, without prejudice to the right of such person to take possession (*i*).

(*b*) *Kelly v. Staunton*, 1 Hog. 393.

(*c*) *Pease v. Fletcher*, L. R., 1 Ch. Div. 273.

(*d*) 3 Ves. 32; 1 J. & W. 648-9; *Dalmer v. Dashwood*, 2 Cox, 378; *Anderson v. Kemshead*, 16 Beav. 329.

(*e*) 2 Sw. 138; *Greville v. Fleming*, 2 Jo. & Lat. 335.

(*f*) *Barrowes v. Molloy*, 2 Jo. & Lat. 521.

(*g*) *Taylor v. Emerson*, 4 Dra. & War. 117.

(*h*) *Berney v. Sewell*, 1 Jac. & W. 647; *Hiles v. Moore*, 15 Beav. 175; *Bates v. Brothers*, 17 Jur. 1174; 2 Sm. & G. 509.

(*i*) *Berney v. Sewell*, *supra*; *Davis v. Duke of Marlborough*, 2 Sw. 137; *Norway v. Rowe*, 19 Ves. 153.

608. It is only in favour of prior legal incumbrancers that this principle is applied. It will not enable a third mortgagee who, having lent his money with notice of the second mortgage (1007), has taken possession, and bought in the first, to hold until payment of his own debt, as well as of that which is due upon the first security (*k*); though it is presumed that a good right to tack would entitle him to hold in such a case against an equitable mortgagee's right to a receiver.

But it has been held to apply (*l*) in favour of persons in possession entitled to prior charges on the estate, though they had applied part of the rents in payment of interest due on part of the prior charges, which, having been paid off by the tenant for life, had been kept alive and assigned for his benefit; it being the proper course, as between the owners of the life estate and of the inheritance, to keep down such interest out of the rents, and not to treat the surplus rents, after payment of the interest of the unpaid part of the principal, as applicable to the discharge of such unpaid principal.

An incumbrancer who is in possession, not in that character, but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver (*m*).

609. Under the first of the rules stated above, the prior mortgagee, in order to save his possession, must be able to swear that something (however small, it seems, may be the amount) (*n*) is due to him upon his security. If he will do so, no receiver will be appointed against him, and the only course is to pay him off according to his own statement of his debt (*o*).

But if he refuse to accept what is due, or confess that he is paid off, or if he will not swear that something is due, the court will appoint a receiver (*p*): and it being the mortgagee's business so to keep his accounts, that he may know whether

(*k*) *Hiles v. Moore*, 15 Beav. 175.

(*l*) *Faulkner v. Daniel*, 3 Hare, 204, n. *

(*m*) *Archdeacon v. Bowes*, 3 Anst. 752.

(*n*) *Chambers v. Goldwin*, cited 13

Ves. 378; *Quarrell v. Beckford*, 13 Ves. 377; and cited 1 Jac. & W. 649.

(*o*) *Berney v. Sewell*, 1 Jac. & W. 647; *Rowe v. Wood*, 2 id. 557.

(*p*) *Berney v. Sewell*, *Chambers v. Goldwin*, *supra*.

anything is due, the incomplete state of his accounts will not help him, though time may be given to make an affidavit of the debt (*q*). It has been intimated (*r*), that where neither party can ascertain what is due, by reason of the negligent mode of keeping the accounts, the court may assume that nothing is due.

The mortgagee, it seems, must swear, that some definite sum is due. It is not enough (*s*) for him to state, in general terms, his belief that when the accounts are taken some particular sum, and parts of other sums, will be found due; without supporting the statement by any accounts, which will serve to test its truth.

Where there is a direct statement in the mortgagee's answer, that some definite sum is due, the court will not try the truth of the statement by affidavits against the answer (*t*).

610. Under the second rule (607), the receiver will be appointed without prejudice to the rights of the prior legal owner (*u*), whether he refuse to take, or is otherwise out of possession. And so, if a receiver be sought by one whose security is subject to prior equitable estates, the court will appoint a receiver, not disturbing the prior equities, but directing that the priorities of the several incumbrancers be ascertained (*x*).

611. Where the receiver has been appointed in the absence of the prior mortgagee, the latter must apply to the court for liberty to bring ejectment, which is granted as of course (*y*) (1491): but where the appointment was made in a suit, to which the prior mortgagee was a party, at a time at which he was unable to take possession, he may have the receiver

(*q*) *Codrington v. Parker*, 16 Ves. 422; *Dalmer v. Dashwood*, 2 Cox, 378; 469; *Hiles v. Moore*, 15 Beav. 175. *Rhodes v. Mostyn*, 17 Jur. 1007.

(*r*) *Codrington v. Parker*, *supra*.

(*s*) *Hiles v. Moore*, *supra*.

(*t*) *Rowe v. Wood*, 2 Jac. & W. 557.

(*u*) *Davis v. Duke of Marlborough*, 2 Sw. 138; *Berney v. Sewell*, 1 Jac. & W. 647; *Bryan v. Cormick*, 1 Cox,

(*x*) *Davis v. Duke of Marlborough*, 2 Sw. 138; *Metcalf v. Archbishop of York*, 1 M. & C. 547.

(*y*) *Bryan v. Cormick*, 1 Cox, 422; *Angell v. Smith*, 9 Ves. 385; *Brooks v. Greathhead*, 1 Jac. & W. 176.

discharged, and an order for possession, when he has been found to be first incumbrancer, and has completed his title to possession (*z*). And no condition will be imposed upon him for payment of any part of the costs which have been incurred in defending the estate against adverse claimants, though the proceedings were beneficial to him, if he merely acquiesced, but took no part in such proceedings (*a*).

612. There are many cases in which a receiver will be appointed, against the legal estate; but in which the court expects the plaintiff to proceed with the most complete and honest diligence to obtain a decree (*b*). The legal mortgagee in possession, whose security is subject to equitable interests, which he refuses to satisfy, may be subjected to a receiver (*c*). And so may a legal owner, who claims under a title which, although not yet set aside, lies under strong suspicion of fraud (*d*): but not where the right is only doubtful, the legal estate having been obtained without fraud, and the rents and profits not being alleged to be in danger (*e*). For the court, it has been said (*f*), always appoints a receiver against the legal title with reluctance; compelled by judicial necessity, the effect of fraud clearly proved, and imminent danger if the intermediate possession should not be taken under the care of the court.

613. There must also be a reasonable probability that the persons, who claim to disturb the possession, will ultimately establish a title to it (*g*). Hence where possession had not

(*z*) *Langton v. Langton*, 1 Jur., N. S. 1078; 7 De G. M. & G. 80.

(*a*) *Langton v. Langton*, *supra*.

(*b*) 17 Jur. 865.

(*c*) *Pritchard v. Fleetwood*, 1 Mer. 54, 722.

(*d*) *Stilwell v. Wilkins*, Jac. 280; and see *Huguenin v. Baseley*, 13 Ves. 105.

(*e*) *Lancashire v. Lancashire*, 9 Beav. 120; *George v. Evans*, 4 Y. & C. 211.

(*f*) Per Lord Eldon, *Lloyd v. Pas-singham*, 16 Ves. 70. See *White v.*

Smale, where a receiver was appointed in a suit on behalf of grantees of rent-charges with powers of distress and entry, for want of protection against which, tenants for the property could not otherwise be obtained. (22 Beav. 72.)

(*g*) *Bainbrigg v. Baddeley*, 3 Mac. & G. 413; 13 Beav. 355; *Clarke v. Dew*, 1 R. & M. 103; and see *Owen v. Homan*, 3 Mac. & G. 378, on ground of doubtful title; affirmed by House of Lords, on ground of, suspected fraud,

been obtained by fraud, but was held under the sanction of the court, and the property was not shown to be in imminent danger, a receiver was refused on appeal after a verdict at law, not completed by judgment, and after which a motion had been granted for a new trial (*h*). And it seems that even if no order had been made for a new trial, the court would not have appointed a receiver (*i*) against a person claiming the legal title, and in possession, so long as the verdict in the applicant's favour was not completed by judgment; until which completion the verdict was not receivable in evidence, and was altogether without credit upon the question of reasonable probability of the success of the person in whose favour it was given. Nor will the question be affected by the circumstance that the legal estate is outstanding in trustees, because they hold for the party whose claim shall be ultimately successful (*k*).

614. A receiver has been appointed against persons in possession of the legal estate, under a voluntary settlement, at the instance of a subsequent purchaser, claiming under the settlor for valuable consideration; on the ground that the purchase, though said to be for an inadequate consideration, had been held to be enforceable (*l*). And so, where the applicant cannot make use of his legal remedy, by reason of a breach on the part of the legal owner in possession of a contract which the court can enforce; such as a contract to execute a mortgage (*m*), or to make a precarious security on an estate tail effectual against the reversion (*n*).

615. A receiver has been refused (*o*) to a husband, setting up an adverse right against his wife and her trustees upon her separate estate; neither his rights, nor those of the wife, being determined. On the other hand, the court will not appoint

4 H. L. C. 997; 17 Jur. 861; see also *Davenport v. Davenport*, 7 Hare, 217; *Haigh v. Jagger*, 2 Coll. 231; *Collard v. Allison*, 4 Myl. & Cr. 487; *Landon v. Morris*, 5 Sim. 247.

(*h*) *Bainbrigge v. Baddeley*, *supra*.

(*i*) *Id.*

(*k*) *Id.*

(*l*) *Metcalf v. Pulvertoft*, 1 Ves. & B. 180.

(*m*) *Shakel v. Duke of Marlborough*, 4 Mad. 463.

(*n*) *Free v. Hinde*, 2 Sim. 7.

(*o*) *Wilcs v. Cooper*, 9 Beav. 294.

a receiver, in favour of a person whose right is disputed, where the effect of the order would be to establish the right; even if the court be satisfied that the person against whom the demand is made is fencing off the claim. Therefore a receiver of tithe rent-charge was refused, on the summary application (*p*) of a person claiming to be, and making affidavit (but without further proof) that he was lay impropriator, where his title was contested, and the only payments of tithes made to him had been made by a receiver (*q*).

616. Where the legal title to a ship was in question, a receiver was refused, but the court made an order (*r*), by which the legal proceedings for ascertaining the title were accelerated, and took possession of the ship; giving each party liberty to apply for the possession or use, upon giving security to deal with her as the court should direct.

617. A receiver will not be appointed at the instance of one of several persons entitled to a charge upon an estate which is vested in trustees, upon trust for sale of the estate, and payment of the charges, where it is not shown that the appointment would be beneficial to the estate, and no misconduct (*s*) or mismanagement is imputed to the trustees; nor against consignees of colonial estates, entitled to the consignments under a covenant, where they have duly applied the produce, and have neither made an oppressive use of their powers, nor an improper disposition of the surplus (*t*).

And no receiver will generally be appointed, merely on account of the death or disclaimer of some or one of several trustees, without the consent of the others, or other of them (*u*); but in such cases (*x*), or if the estate be endangered by the

(*p*) See 1 & 2 Vict. c. 109 (Ireland), s. 30.

(*q*) *Greville v. Fleming*, 2 Jo. & Lat. 335; there being no appeal against the order so made.

(*r*) *Ridgway v. Roberts*, 4 Hare, 106.

(*s*) *Barkley v. Lord Reay*, 2 Hare, 308.

(*t*) *Bunbury v. Winter*, Jac. 255.

(*u*) *Browell v. Read*, 1 Hare, 434.

(*x*) *Tidd v. Lister*, 5 Mad. 483; *Brodie v. Barry*, 3 Mer. 695; *Beaumont v. Beaumont*, cited id. 696.

misconduct of one trustee (*y*), a receiver will be appointed on the consent of the others; and without any consent where all the trustees misconduct themselves (*z*).

On the disclaimer of one trustee, a receiver has, however, been appointed against the other, giving liberty to either [each?] to offer himself (*a*).

618. It was contrary to the practice to appoint a receiver against one legal joint tenant, or tenant in common in possession, on the application of another, because the person seeking the appointment had a legal remedy (*b*); or against one of such tenants being entitled to and having possession, though not having the legal estate, unless there were evidence that he had excluded the others from the profits (*c*); but there might be a receiver of the applicant's share of the rents and profits (*d*). A receiver has also been appointed (pending a partition suit in a case of doubtful title) (*e*) of the rents and profits of a moiety of the estate, with power to manage, set and let such moiety, with the approbation of the Master; though Lord Northington objected to appoint a receiver of an undivided moiety, because he cannot let, set or distrain without the owner's consent (*f*). In *Hargrave v. Hargrave*, however, the existence of outstanding terms prevented the plaintiff from getting relief at law, placing him in the position of a tenant in common in equity, who, having no legal remedy, may have a receiver; unless, if the court think fit, the tenant in possession will give security to account for the applicant's share of the rents (*g*).

619. Where some of the owners are infants, there may also

(*y*) *Middleton v. Dodswell*, 13 Ves. 268.

(*z*) *Wilson v. Wilson*, 2 Keen, 249.

(*a*) *Tait v. Jenkins*, 1 Y. & C. C. C. 492; Fall v. Elkins, 9 W. R. 861.

(*b*) *Tyson v. Fairclough*, 2 Sim. & St. 142, disapproving of *Milbank v. Revett*, 2 Mar. 405; but see now the Judicature Act, 1873, s. 25 (8). *Pease v. Fletcher*, L. R., 1 Ch. Div. 273.

(*c*) *Sandford v. Ballard*, 30 Beav.

109; 7 Jur., N. S. 651; 33 Beav. 401; 10 Jur., N. S. 251.

(*d*) *Id.* 30 Beav. 109; 7 Jur., N. S. 651.

(*e*) *Hargrave v. Hargrave*, 9 Beav. 549.

(*f*) *Willoughby v. Willoughby*, cited 2 Dick. 478; see *Calvert v. Adams* there.

(*g*) *Street v. Anderton*, 4 Bro. C. C. 414.

be a receiver over the whole estate, with direction to pay the shares of the adults in the rents to them (*h*). And the object here being to protect the estate during the minorities of all the infants, the receiver will not be discharged as to the share of one of them who has attained his full age. The application, it seems, should be for payment of the share of the adult to himself.

620. A receiver may be appointed in a foreclosure suit against the mortgagor in possession, having the legal title, on the application of an equitable mortgagee (*i*); and over the rents and profits, where there are several mortgagors, tenants in common, though one of them be absent, if the other be in possession of the rents (*h*). There was formerly a difficulty in giving this relief in a redemption suit, because it was not generally competent for a defendant to apply for relief against a plaintiff without filing a cross bill (*l*). A receiver was accordingly refused (*m*), on an application, after the hearing, to add the appointment to the decree; though it was said that perhaps it might have been done on petition upon due notice given. And even where the plaintiff had asked a receiver by his bill, the court refused the appointment on the defendant's application (*n*), if the plaintiff opposed it. But relief properly claimed by a defendant may now be given in the same suit (*o*).

621. Nor could a defendant ask for a receiver at the hearing against a co-defendant: but after decree, the court appointed a receiver against a defendant, being mortgagee in possession, at the instance of a co-defendant, for the protection of the rents; it appearing, by the Master's report, that the mortgagee in possession had held for many years, and was chargeable with a considerable sum for occupation rent; and it being shown that he had delayed the accounts and could not state clearly

(*h*) *Smith v. Lyster*, 4 Beav. 227.

(*i*) *Aberdeen v. Chitty*, 3 Y. & C. 379.

(*k*) *Holmes v. Bell*, 2 Beav. 298.

(*l*) *Brown v. Newall*, 2 My. & C.

558; *Wynne v. Griffith*, 1 Sim. & St. 147; ——— *v. ———*, 2 Dick. 778.

(*m*) *Barlow v. Gains*, 8 Beav. 329.

(*n*) *Robinson v. Hadley*, 11 Beav. 614.

(*o*) Judicature Act, 1873, s. 24 (3).

that anything remained due on his prior security, by virtue of which he held possession (*o*).

So a receiver has been appointed in a foreclosure suit, after decree, against the mortgagee, as part of the terms upon which the time for redemption was enlarged (*p*) (1688), for the purpose of enabling the defendant to appeal against the decree establishing the mortgage.

622. It has been considered (*q*) that no receiver can be appointed over an estate where the equitable owner, being out of the jurisdiction, could not be served with a subpoena; and an appointment made by Lord Eldon at the instance of a *puisné* incumbrancer, in a case (*r*) in which the mortgagor was absent, was thought not to be opposed to this rule; because the first mortgagee, by whose refusal to take possession the applicant was alone prevented from doing so, was before the court. But it was not observed that in the case of *Coward v. Chadwick* (*s*), which was much relied on in support of this view, and in which the mortgagor who was in possession was absent, Lord Eldon also on appeal appointed a receiver. The reasoning of Lord Eldon was, that if the residence of the mortgagor out of the jurisdiction should have the effect imputed to it, the mortgagee might in effect lose his remedy. In the case of an absconding owner, whose residence is unknown, the authorities seem to be conclusive that a receiver may be appointed (*t*). Where his residence is known he can be served out of the jurisdiction (*u*).

623. The exercise by the father of an infant of the power given by 12 Car. 2, c. 24, ss. 8, 9, to appoint a testamentary

(*o*) *Hiles v. Moore*, 15 Beav. 175; but see now Judicature Act, 1873, s. 24 (3).

(*p*) *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

(*q*) *Lyde v. Hale*, 4 L. J. (Ch.), N. S. 180; *Shaw v. Shore*, 5 id. 79, and cases cited there; *Stratton v. Davidson*, 1 R. & M. 464.

(*r*) *Tanfield v. Irvine*, 2 Russ. 149.

(*s*) 2 Russ. 150, note; on App. id.

634; 4 L. J., Ch. 67; and see now Judicature Act, 1873, s. 25 (8), Ord. LII. (4).

(*t*) *Dowling v. Hudson*, 14 Beav. 423; see *Coward v. Chadwick*, *supra*; *Gibbins v. Mainwaring*, 9 Sim. 77; *Maguire v. Allen*, 1 Ba. & Be. 75; *Quin v. Gunn*, 1 Hog. 75; and see other cases cited 14 Beav. 424, note.

(*u*) 4 & 5 Will. 4, c. 82; Judicature Act, 1875, Ord. II.

guardian, to whom the statute gives the custody of the profits of the infant's lands and the management of his personal estate, does not affect (*x*) the right of the court to appoint a receiver, the guardian having no estate and the extent of his powers being uncertain.

624. A judgment creditor may have a receiver over the debtor's real or personal estate, after execution (*y*); and it is sufficient that he has issued an *elegit*, though an imperfect return or no return has been made to it; and one *elegit* is sufficient, though the property be in several counties (*z*). But as to the real estate, he can have no receiver where an *elegit* has not been issued, unless one year have elapsed from the time of entering up the judgment (*a*).

625. By the Sheriffs' Act (*b*) (Ireland), the Court of Chancery may appoint a receiver or extend a receiver already appointed, over the rents and profits of the whole or a sufficient part of the debtor's lands, tenements or hereditaments which are liable to the judgment; and to such receiver are to be paid all rents due or to become due (but not before the enrolment of the recognizance), in respect of the lands, rents and profits received by the receiver appointed under the act, to be applied according to the priority of each creditor, as ascertained by the date of entry of the judgment or enrolment of the recognizance: and the priorities of the creditors are to be determined without reference to any inquisition which one of them may have obtained on any outlawry or other proceeding; and every creditor who has obtained an order for a receiver under the act, shall be considered to be an execution creditor from the date of the order, so as not to be affected by the bankruptcy

(*x*) *Gardner v. Blanc*, 1 Hare, 381.

(*y*) *Rhodes v. Lord Mostyn*, 17 Jur. 1007; *Smith v. Hurst*, 1 Coll. 705; and see *Greenway v. Bromfield*, 9 Hare, 201.

(*z*) *Lord Dillon v. Plaskett*, 2 Bl. N. R. 239.

(*a*) *Smith v. Hurst*, 1 Coll. 705; see

1 & 2 Vict. c. 110, s. 13; and see s. 14; and *Bristed v. Wilkins*, 3 Hare, 235, as to the creditor's remedy during the six months limited by that section.

(*b*) 5 & 6 Will. 4, c. 55, sects. 31, 32, 33, 37.

of the debtor, further than he would be, if his debtor became bankrupt after execution executed.

It is also provided (c), that every sum which shall be received by a receiver, before an order shall be made to extend him to the matter of another petition, shall be distributed under the orders of the court, as if such extending order had not been made; but in distributing the funds to be received after the extending order, the court shall have regard to the rights of the persons by whom that order was obtained, and has power to direct that the costs of the persons by whom the first appointment of a receiver was obtained, in obtaining such appointment, shall be paid out of the funds collected by the receiver, without regard to the priority of the person on whose application the receiver was so appointed. Although the act thus provides for the administration of the rents between conflicting judgment creditors, it is silent as to the claims of mortgagees or specific incumbrancers coming into conflict with judgment creditors. It has been held, that all arrears of rent, which are paid to a receiver appointed under this act, are applicable (d) in discharge of the debt of the judgment creditor at whose instance he was appointed, to the exclusion even of the plaintiff, where he is a prior incumbrancer. As to arrears due when the receiver is extended, at the instance of a prior creditor, they are in like manner applicable to the debt of the extending creditor; for the extending order is equivalent to the appointment of a new receiver, and when it is obtained a new and paramount right springs up. And the provision in the act for the costs of the creditor who obtained the first appointment, shows that he was to have no priority other than that which he obtained by his greater diligence, whilst the prior creditor neglected to get a receiver. A different view has however been taken of the law upon these points by several of the judges in Ireland (e).

The receiver appointed by the act comes in the place of an

(c) Id. s. 38.

(d) *Morrogh v. Hoare*, 5 Ir. Eq. R. 195; *Abbott v. Stratten*, 3 Jo. & Lat. 603; see also *Gresley v. Arderley*, 1 Sw. 573; *Thomas v. Brigstocke*, 4 Russ.

64; *Brooks v. Greathead*, 1 Jac. & W. 176.

(e) See *Barry v. Wilkinson*, 3 Ir. Eq. R. 121 and 564; *Coleman v. Mason*, 4 Id. 427; *Rule v. Henry*, Flan. & Kel. 97; *Sligo v. O'Malley*, Id. 300.

clegit; but the appointment of a receiver does not decide the question of equitable right between the parties, the creditor who obtains the order being bound by the same equities as those which bind the elegit creditor.

The receiver is to account once a year, and the person for whose benefit he is appointed or continued, will be chargeable for any loss incurred by the receiver's neglect to account, if he have not taken the necessary proceedings to compel him to do so; which proceedings may also be taken by any person interested in the matter (*f*).

626. The Court of Chancery in Ireland, in carrying out this act, adopted the mode of appointing a receiver by orders conditional and absolute; but it was by the absolute order that the rents were held to be bound; though the Court of Exchequer, by reason, it seems, of some difference in its practice as to the appointment, considered the rents to be bound from the date of the conditional order. A receiver was therefore discharged (*g*) in Chancery, where the order absolute was made after the debtor had committed an act of bankruptcy, the creditor being held not to have, before that time, an execution executed.

627. Monies received by the receiver, before an order of extension (sect. 31), are distributable as if no such order had been made; but in distributing monies afterwards received, the court has regard to the rights of those at whose instance the extension order was made, and may direct payment out of the funds collected by the receiver of the costs incurred in procuring his appointment, without regard to the priority of the person on whose application the appointment was made (*h*). But where an extension order is made, the monies received will still be applicable according to the legal rights of the parties. Therefore (*i*), where an annuitant on a life estate

(*f*) 5 & 6 Will. 4, c. 55, Sheriffs' Act (Ireland), ss. 34, 35.

(*h*) Sect. 38.

(*g*) Burt v. Bernard, 3 Dru. & War. 671.

(*i*) Corbet v. Mahon, 2 Jo. & Lat.

had obtained a receiver over the whole property, and an extension order was made in favour of a judgment creditor, whose demand affected the inheritance, the latter was considered to be an original appointment, and the judgment creditor was held entitled to levy the whole of the rents against the annuitant, who was in no better position than the tenant for life, through whom he claimed. The course, in such a case, seems to be to procure the discharge of the order appointing the receiver over the whole of the lands, and to limit his appointment to so much as may be thought proper.

628. By 3 & 4 Vict. c. 105 (*k*) (Ireland), any person entitled to sue out an *elegit* or to issue execution in any suit or proceeding on any recognizance, may apply by petition to the Court of Chancery for a receiver over any lands, tenements, rectories, tithes, annuities, rents or hereditaments by the act made liable to be seized, extended, appraised or taken in execution on any such judgment, and also (after a charging order shall have been obtained (*l*)) all government stock, funds or annuities, or shares in any public company, or the dividends or proceeds thereof to which the judgment creditor or any person in trust for him may be entitled; and the receiver may be appointed or extended under the Sheriffs' Act, or the present act, in a summary way, on petition, over any property of the judgment debtor which could be made available by such creditor for the payment of the judgment debt, by filing (after issue and return of a writ of execution at law upon such judgment) a bill in equity, or by any writ of execution at law, or (subject to the proviso therein referred to) by petition under the act; and the court may appoint or extend a receiver accordingly over the whole or so much thereof as shall appear sufficient for discharging the sum due on the judgment or recognizance; and every such petition shall state the judgment or recognizance and the sum due thereon, and shall be verified by the affidavit of the person interested, or by such other affidavit as the court shall

(*k*) Sect. 21.

(*l*) Sects. 23, 24.

direct, stating the sum due for principal, interest and costs over and above all just allowances; and the court may require proof by the affidavit of the applicant or otherwise of the particulars of the property, and the nature, value and situation thereof; and the proceedings may be continued by or against the representatives of the persons originally interested or liable, in the same manner as under the Sheriffs' Act; and no petition is necessary or proper under either act to obtain an order after an order shall have been made on the first petition presented in such matter.

629. By another act (*m*), when the Court of Chancery in Ireland by any law, practice or statute is empowered to appoint a receiver over real estate for the payment of any charge thereon, it may have regard to the amount of the charge, the rental of the estate, and the other remedies and securities, if any, of the creditor, and other circumstances, and may decline or postpone appointing a receiver, if it shall be of opinion that the appointment is unnecessary or inexpedient, or would not be of substantial benefit to the creditor; and the costs of the application are in the discretion of the court.

630. No receiver is to be appointed in respect of any judgment, or judgment mortgage, where the sum due thereon shall not exceed £150, nor where the rental of the estate shall not exceed £100 per annum. But this restriction does not apply to the extension of a receiver already appointed (*n*). Nor does the act affect the jurisdiction of the court to appoint receivers for the payment of tithes or tithe rent-charge (*o*).

631. Under the Sheriffs' Act the court refuses to appoint a receiver against a prior *elegit* creditor in possession, and the petitioner must be in a position to sue out an *elegit* (*p*). But

(*m*) 19 & 20 Vict. c. 77, s. 2. By sect. 5 of this act, the Mortgage Act (Ireland), 11 & 12 Geo. 3, c. 10, is repealed.

(*n*) Sect. 3.

(*o*) Sect. 4.

(*p*) *Hobson v. Murphy*, 2 Jo. 169; *Kennedy, pet., Whitney, resp., Sau. & Sc.* 375.

the existence of a prior legal security is no bar to the appointment, unless the prior mortgagee either holds or will take possession (*q*), though it will be made without prejudice to his right. Nor will it be prevented by a mere allegation that the judgment or security upon which the application is founded is fraudulent (*r*). It has been said that it should be refused where there is a clear equity to restrain the judgment creditor from proceeding at law, or where his right to proceed at law is not clear (*s*); but it was afterwards determined that the order ought to be made if the petitioner has a clear right to issue an *elegit* and proceed to execution, and that an equitable defence, though it be one of the sufficiency of which, when properly enforced, the court has no doubt, ought not to be admitted against the appointment of a receiver under the act. But the court retained the fund to give time to establish the equitable defence (*t*).

632. An application *ex parte* for a receiver under the Sheriffs' Act is not a *lis pendens* affecting a purchaser (*u*) (960).

Of what Property a Receiver may be appointed.

633. A receiver may generally be appointed over any property, real or personal, which may be taken in execution at law (upon an analogy to which remedy the creditor's right to a receiver is founded) (*x*), or which is assets in equity. And even a Government pension (*y*), or office under the Crown (*z*) (372), may be the subject of a receivership, provided the profits be payable out of some certain fund; for otherwise

(*q*) *Smith, pet., Egan, resp.*, San. & Sc. 238.

(*r*) *Maxwell, pet., O'Dell, resp.*, San. & Sc. 194.

(*s*) *Kenny v. Clarke*, 5 Ir. Eq. R. 284; *Whaley v. Clarke*, *id.* 444.

(*t*) *Walsh v. Keane*, 11 Ir. Eq. R. 426.

(*u*) *Tenison v. Sweeny*, 1 J. & L. 710.

(*x*) 1 Sw. 83. Receiver and manager of a newspaper till hearing of

cause, he undertaking to print, publish and edit the paper, and forthwith to register himself proprietor according to the statute. (*Chaplin v. Young*, 6 L. T., N. S. 97.)

(*y*) *Noad v. Backhouse*, 2 Y. & C. C. 529. And it appears that no order on the Lords of the Treasury is necessary. (See *McCarthy v. Gould*, 1 Ba. & Be. 387.)

(*z*) *Blanchard v. Cawthorne*, 4 Sim. 566.

(as in the case of the salary in the nature of fees attached to an office held under the Treasury, and paid out of a sum annually voted by Parliament for a particular purpose, and for which no action could be maintained) (*a*) there can be no receiver. So there can be no receiver of rates, which are to be assessed and collected at a future time; for until the assessment there is nothing to collect (*b*): but there may be of the tolls of turnpike roads, or of canal and railway companies, or the like, because these are fixed payments in the nature of rent (*c*). And this, where the mortgages are complete in the ordinary form (*d*), though the act give special powers to the mortgagees, whose interest is in arrear (without prejudice to their other rights and remedies), to obtain a receiver: and to holders of debentures of public companies, the appointment of a receiver has been the only equitable remedy open, the right of sale or foreclosure having in the public interest been denied (*e*). A receiver will be appointed under such circumstances, in favour of a debenture holder whose principal is due, and who has given six months' notice for payment of it, although there be no interest in arrear (*f*) (390). And note, that where a public undertaking is carried on by trustees or others empowered by statute, the appointment of a receiver does not supersede the powers of the act, or make the future management illegal, as being carried on by unauthorized persons. The management remains in its original hands, and the receiver does no more than pay the expenses, and apply the surplus proceeds under the order of the court (*g*), which generally declines to appoint a manager over a public undertaking (*h*); though under a late statute it is

(*a*) *Cooper v. Reilly*, 2 Sim. 560; 1 R. & M. 560.

(*b*) *Drewry v. Barnes*, 3 Russ. 94.

(*c*) *Dumville v. Ashbrooke*, 3 Russ. 98, n.; and see *Knapp v. Williams*, 4 Ves. 430, n.; 3 Russ. 105; *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142; *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332; *Lord Crewe v. Edleston*, 1 De G. & J. 93; 3 Jur., N. S. 128, 1061; *De Winton v. Mayor of Brecon*, 26 Beav. 533.

(*d*) *Fripp v. Chard Railway Co.*, 17 Jur. 887; 11 Hare, 241.

(*e*) *Furness v. Caterham Railway Co.*, 25 Beav. 615.

(*f*) *Hopkins v. Worcester and Birmingham Canal Co.*, L. R., 6 Eq. 437.

(*g*) *Ames v. Trustees of the Birkenhead Docks*, 20 Beav. 332.

(*h*) *Gardner v. London, Chatham and Dover Railway Co.*, L. R., 2 Ch. 201. See *Griffin v. Bishop's Castle Railway Co.*, 15 W. R. 1058.

empowered to do so in the case of railway companies, as a substitute for the remedy by execution against the rolling stock and plant of the company, which is temporarily taken from the judgment creditor (*i*) (500). But a mortgagee of the rates and tolls of an undertaking has no right to a receiver against a claimant of the lands of the company, though the tolls arise out of such lands, and though a judgment creditor, by taking the lands, may altogether prevent the raising of the tolls (*k*).

A judgment creditor of the land may, however, be allowed to use his remedy, subject to the rights of a receiver already appointed over the rates and tolls, and subject to the rights of the public, where the public has any interest, under the constitution of the company (*l*).

A receiver will not be granted over the rates of a borough, upon the security of which debenture bonds have been issued, where there is no default in payment of interest, and the principal is in course of payment according to the terms of the statutory authority (*m*).

634. It has been held that there might be a receiver, both of past and future appropriations, in respect of the profits of the fellowship of a college (*n*), and of the canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence, and of attendance on divine service (*o*):

(*i*) *Railway Companies Act, 1867*, 30 & 31 Vict. c. 127, s. 4. As to the receiver to be appointed under sect. 54 of the Companies Clauses Consolidation Act, see *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125. And as to the right of a judgment creditor of a corporation to a receiver upon property acquired by the corporation after the Municipal Corporation Acts, see *Arnold v. Mayor of Gravesend*, 2 Jur., N. S. 703. And as to the right of a mortgagee after the Corporation Act against a receiver appointed at the suit of a judgment creditor whose debt originated before the act, see *Arnold v. Mayor of Gravesend*,

id. 706.

(*k*) *Perkins v. Deptford Pier Co.*, 18 Sim. 277; and see a somewhat similar point, but turning upon the words of the Companies Clauses Consolidation Act, and of the special act, in *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 125.

(*l*) *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142; see *Gray v. Chaplin*, 2 Russ. 126.

(*m*) *Preston v. Corporation of Great Yarmouth, L. R.*, 7 Ch. 655.

(*n*) *Feistel v. King's College*, 10 Beav. 491.

(*o*) *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544.

the duties of these offices not being considered to be within the rule of public policy (375).

635. The law is otherwise where the payment is to enable the grantee to perform future duties (*p*), as in the case of the half-pay of officers and others in the public service, the alienation of whose stipends would prevent prompt attention to their duties when required (*q*) (373). So as to a pension for the support of a dignity, granted as a memorial of and reward for great public services (*r*): though the latter decision seems to have turned considerably upon the language of the statute, which expressly made the receipts of the grantee and his successors proper discharges for the pension. But over pensions which may be lawfully assigned a receiver will be appointed (*s*).

636. There cannot now be a receiver of the profits of an ecclesiastical benefice, because direct charges upon such property are prohibited by 13 Eliz. c. 20; and no indirect charges thereon by way of judgment, under 1 & 2 Vict. c. 110, s. 13, are of any force (*t*) (376).

Where the validity of the assignment is doubtful, the court may appoint a receiver without prejudice to that question (*u*).

637. A receiver or manager of mines may be appointed at the instance of one of several part owners, because of the peculiar nature of the property and the difficulty of management, where each owner claims a separate right of working; a mine being considered in this respect to be in the nature of a trade (*x*); but not against a mortgagee on the ground of mismanagement by omitting (*y*) to lay out more than a pru-

(*p*) 1 Sw. 79. In *Palmer v. Vaughan*, 3 Sw. 173, the question was not decided as to the profits of the office of clerk of the peace, which, it was also argued, is an office touching the administration of justice within 5 & 6 Edw. 6, c. 16 (372).

(*q*) 2 Beav. 549.

(*r*) *Davis v. Duke of Marlborough*,

1 Sw. 74.

(*s*) *Heald v. Hay*, 3 Gif. 467; 8 Jur., N. S. 379.

(*t*) *Hawkins v. Gathercole*, 6 De G., M. & G. 1; 1 Jur., N. S. 481.

(*u*) *Palmer v. Vaughan*, 3 Sw. 173.

(*x*) *Jefferys v. Smith*, 1 Jac. & W. 298.

(*y*) *Rowe v. Wood*, 2 Jac. & W. 553.

dent owner would advance, though a larger expenditure would be likely to benefit the mine (1531). No receiver will be appointed in ordinary cases of lands belonging to tenants in common, unless (*z*) one of them be in possession of the whole of the rents (618).

638. A receiver may be appointed over a colonial estate (*a*); and as well over property of a personal kind as over the rents, profits and produce of realty, in a dependency or foreign country; and he will be authorized, if it be found expedient, to appoint an agent (with the approbation of the judge (*b*)) in the foreign country, power being given to execute the necessary instrument to enable such agent to act (*c*). As to property which is out of the jurisdiction, the receiver will recover possession of it according to the laws of the country in which it is found (*d*).

Where the estate was in a distant dependency, the court, with the view of retaining its power over the receiver, ordered the appointment of a person in this country, who might appoint his own agent in the country where the estate was situate (*e*); but in the case of an executor, where there are assets abroad, the court will appoint a receiver in the foreign country, who shall find sureties in England, and so relieve the receiver from all responsibility with respect to his agent (*f*).

At what Stage of the Action the Appointment may be made.

639. The receiver may be appointed before appearance of the owner of the equity of redemption, if, but not unless, from the state of the security, or other urgent circumstances, an immediate appointment be necessary (*g*); and even before

(*z*) *Holmes v. Bell*, 2 Beav. 298.

(*a*) See *Barkley v. Lord Reay*, 2 Hare, 308.

(*b*) Set. 560, ed. 2; 1038, ed. 3.

(*c*) *Hinton v. Galli*, 24 L. J. (Ch.), N. S. 121; see *Toller v. Carteret*, 2 Vern. 494. As to order for receiver in England of Irish estates, see *Houl-ditch v. Donegal*, 8 Bli., N. S. 343;

2 Will. 4, c. 33; 4 & 5 Will. 4, c. 82; and see 2 Sw. 325, n.

(*d*) *Smith v. Smith*, 10 Hare, 71.

(*e*) ——— *v. Lindsey*, 15 Ves. 91.

(*f*) *Cockburn v. Raphael*, 2 Sim. & St. 453.

(*g*) *Meaden v. Sealey*, 6 Hare, 620; and see *Hart v. Tulk*, id. 611; *Caillard v. Caillard*, 25 Beav. 512.

service of the copy bill, if the defendant have absconded (*h*), and his residence be unknown. It was also admitted to be good reason for such an appointment that the defendant was out of the jurisdiction (*i*); for otherwise such a residence might be fatal to the security. But unless the defendant's residence be unknown, or the circumstances be urgent, the mere fact of absence beyond the jurisdiction seems to be no longer a reason for appointing a receiver before service of the bill; for an order may now be made for good service abroad (*h*); and upon an application since the statute for a receiver, before service on an absent defendant, the court did not make the appointment on the ground of absence, but because the person in actual possession was before the court; the absent defendant being one of two tenants in common, the other of whom was in possession of the whole of the rents (*l*).

If a defendant have made an affidavit in the cause, although no formal appearance be entered, he shall be considered to have appeared, for the purpose of appointing a receiver (*m*).

640. A receiver may be appointed at the hearing, though such relief was not asked, if the facts stated are sufficient to justify the appointment (*n*), but not on the defendant's application (*o*); or it may be done after judgment in cases of urgency, without any supplemental suit (*p*); as where a person not a party to a cause had been so long in possession without accounting, that there was danger of his acquiring an absolute title by adverse possession (*q*); or where

(*h*) *Dowling v. Hudson*, 14 Beav. 423; *Pitcher v. Hellier*, 2 Dick. 580; *Magnire v. Allen*, 1 Ba. & Be. 75; see *Arthurs v. Arthur*, 1 Hog. 95.

(*i*) *Tanfield v. Irvine*, 2 Russ. 149; *Coward v. Chadwick*, id. 150, n., 634; *Gibbins v. Mainwaring*, 9 Sim. 77; see *Noad v. Backhouse*, 2 Y. & C. C. C. 529.

(*l*) X. Cons. Ord. s. 7; *Drummond v. Drummond*, L. R., 2 Ch. 32; Judicature Act, 1875, Ord. II. (4) XI.

(*l*) *Holmes v. Bell*, 2 Beav. 298.

(*m*) *Vann v. Barnett*, 2 Bro. C. C. 158.

(*n*) *Malcolm v. Montgomery*, 2 Mol. 500; *Osborne v. Harvey*, 1 Y. & C. C. C. 116; though *Kindersley, V.-C.*, seems to have thought otherwise; 3 Drew. 120.

(*o*) *Barlow v. Gains*, 8 Beav. 329. But see Jud. Act, 1873, s. 24 (3).

(*p*) *Bowman v. Bell*, 14 Sim. 392; *Thomas v. Davies*, 11 Beav. 29; *Wright v. Vernon*, 3 Drew. 112.

(*q*) *Thomas v. Davies*, *supra*.

the mortgagee in possession, not showing clearly that any thing was due upon his prior mortgage (609), the next security (being on a life estate) was in danger of being lost by the delay, and the possible inability of the first mortgagee to refund, if he should be ordered to do so (*r*).

So, if it appear that the circumstances would, at the hearing, have entitled the party to a receiver; as if a balance be *shown* to be in the hands of the mortgagee (*s*), or if the defendant, by neglecting to bring in the deeds, has prevented the plaintiff from obtaining the benefit of a decree for sale (*t*). But not, it seems, after judgment, where no subsequent circumstances have made it necessary for the protection of the estate or otherwise (*u*).

Where it is otherwise proper to make the appointment after judgment, it may be made, although, by the judgment, further consideration generally (*v*), or the matters in question between the plaintiff and the particular defendant (*x*), have been reserved; such questions not being affected by the appointment.

A receiver may be ordered after decree for sale and administration, against the executor who has neglected to get in part of the estate (*y*).

It has been held in Ireland, that, after a decree taken pro confesso, the application for a receiver must be supported by an affidavit as to the sum due for principal, interest and costs, after all just allowances, and that the defendant is in possession (*z*).

Before the hearing of the cause the court will not hear a motion for a receiver founded upon evidence which has been taken in the cause (*a*).

Of the Persons who may be appointed.

641. The person who is to fill the office of receiver is gene-

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|---|---|
| (<i>r</i>) <i>Hiles v. Moore</i> , 15 Beav. 175. | (<i>r</i>) <i>Hiles v. Moore</i> , 15 Beav. 175. |
| (<i>s</i>) <i>A.-G. v. Mayor of Galway</i> , 1 Mol. 95—104. | (<i>x</i>) <i>Cooke v. Gwyn</i> , 3 Atk. 689. |
| (<i>t</i>) <i>Harris v. Shee</i> , 6 Ir. Eq. R. 543; | (<i>y</i>) <i>Bywater, Re</i> , 1 Jur., N. S. 227. |
| 1 J. & L. 91. | (<i>z</i>) <i>Rogers v. Newton</i> , 2 Ir. Eq. R. 40. |
| (<i>u</i>) <i>Wright v. Vernon</i> , 3 Drew. 112; | (<i>a</i>) <i>Lloyd v. Passingham</i> , 3 Mer. 697. |
| see <i>Hackett v. Snow</i> , 10 Ir. Eq. R. 220. | |

rally selected in proceedings in the judge's chambers; but if both parties can agree upon a proper person, the court will at once insert his name in the decree (*c*). He should be a person, who, consistently with his professional or other pursuits, can spare sufficient time for the duties of the office; and the court will attend to circumstances, tending to show that the person proposed is unable to fulfil this condition, and has, therefore, held (*d*) it to be a ground, not for absolute rejection, but which made further consideration proper, that the proposed receiver was both a member of parliament and a practising barrister; but to the appointment of a practising barrister (*e*), not being a member of parliament, there is no objection.

It appears, however, that a person who fills the latter character is ineligible upon other grounds. The court does not appoint persons to the office of receiver, whose privileges protect them from the ordinary remedies which it may become proper to enforce (*f*); and a peer is therefore disqualified. Lord Eldon, indeed, would not say (*g*) that a member of the House of Commons was absolutely disqualified; being unwilling, perhaps, to lay down a rule, from which it might be inferred, that he did not think such a person amenable to the process of the court. But it appears clear (*h*) that members of the House of Commons are protected from process for contempts of a civil kind, such as would be that incurred by a receiver for disobedience to the orders of the court, though they are liable for criminal contempts, such as the clandestine removal and concealment of a ward of court, or an act injurious to the administration of justice. Whence it seems that they ought not to be appointed receivers.

Nor will any person be chosen whose position may cause difficulty in administering justice, as formerly Masters of the court (*i*); lest there should be a bias in the minds of those whose duty it is to pass the accounts, and because it is by

(*c*) *Anderson v. Kemshead*, 16 Beav. 329; *Powys v. Blagrove*, 18 Jur. 464.

(*d*) *Wynne v. Lord Newborough*, 15 Ves. 283.

(*e*) *Garland v. Garland*, 2 Ves. jun. 137; *Wilkins v. Williams*, 3 Ves. 588.

(*f*) *A.-G. v. Gee*, 2 Ves. & B. 208.

(*g*) 15 Ves. 284.

(*h*) *Long Wellesley's case*, 2 R. & M. 689; *Lechmere Charlton's case*, 2 M. & C. 316.

(*i*) *Fletcher, Exp.*, 6 Ves. 427.

these officers that the receiver himself ought to be checked. The same principle, no doubt, disqualifies the chief clerks of the judges, and has been extended to the solicitor in the cause, or acting under a commission of lunacy (*h*), though generally there is no objection to the appointment of a solicitor (*l*).

So a person who is under security to the Crown, as the receiver-general of a county (*m*), is not eligible, because his whole property may be swept away by the Crown, and the debt to the estate lost.

The like has been held (*n*) of the next friend of an infant plaintiff, who will not be appointed, even by consent of the other party, because it is his duty to control, and to check the accounts of the receiver: and even the son of a next friend has been rejected (*o*).

The same principle applies to a trustee, whether sole, or joint, where he is an accounting party (*p*). And a further reason in this case is, that a trustee ought to derive no advantage from his trusteeship (*q*). Thus, a trustee, with power to lease during the minority of the tenant for life, is within this latter rule; the good of the inheritance being his duty, and the increase of the income his interest (*r*). And the court will even remove (*s*) a receiver whose private interests are in conflict with his duties, though his acts have for the most part been for the general good of the property, and though a majority, both in number and value, of the incumbancers desire that he should be retained.

But a trustee to preserve contingent remainders, or with powers of sale and exchange, which cannot be immediately exercised, may be appointed (*t*); and sometimes the appointment of a trustee may be beneficial, as where he has a peculiar knowledge of the estate, or no other person can be found.

(*h*) *Garland v. Garland*, 2 Ves. jun. 137; *Ex parte Pincke*, 2 Mer. 452.

(*l*) See *Della Caine v. Hayward*, M'Cl. & Y. 272.

(*m*) *A.-G. v. Day*, 2 Mad. 246.

(*n*) *Stone v. Wishart*, 2 Mad. 64.

(*o*) *Taylor v. Oldham*, Jac. 529.

(*p*) *Anon.*, 3 Ves. 515; ——— *v. Jolland*, 8 Ves. 72.

(*q*) *Sykes v. Hastings*, 11 Ves. 363.

(*r*) *Sutton v. Jones*, 15 Ves. 584.

(*s*) *Fripp v. Chard Railway Co.*, 17 Jur. 887; 11 Hare, 241.

(*t*) *Sutton v. Jones*, *supra*.

But a trustee in such cases must act without emolument (*u*). Upon which condition, a testamentary guardian (*x*), or tenant for life (*y*), or other person immediately interested in the estate (*z*), may be appointed. Or liberty may be given to parties to the suit, to propose themselves (*a*).

Upon the ground that he cannot have any benefit beyond his contract, the mortgagee of a West India estate who does not take possession will not be appointed consignee, unless he has stipulated for the advantage (*b*) (209, 349).

Where there is an equitable tenant for life, the court will give the preference to the person proposed by him, being otherwise a proper person (*c*). So the receiver proposed by the mortgagee will not be rejected, if there be no personal objection to him, though a person proposed by the mortgagor may be more experienced in the duties of the office (*d*). But the liquidator of a company has been appointed in preference to the person proposed by the mortgagee, there being no personal objection or suggestion of incompetency, in order to prevent unnecessary expense (*e*).

Of the Authority of the Receiver.

642. It is a general rule, that the receiver should do no act which may involve the estate in expense without the sanction of the court. Therefore he cannot of his own authority bring ejectment (*f*); and if there be two receivers, both acting under the authority of the court, one of them ought not to take possession against the other; but he, or those at whose instance he was appointed, should seek the directions of the court (*g*).

Nor is it proper for the receiver to defend actions brought against him in respect of the estate, without the sanction of

(*u*) *Sykes v. Hastings*, 11 Ves. 363; *Hibbert v. Jenkins*, cited there.

(*x*) *Gardner v. Blane*, 1 Hare, 381.

(*y*) *Powys v. Blagrove*, 18 Jur. 462.

(*z*) *Hoffman v. Duncan*, 18 Jur. 69.

(*a*) *Meaden v. Sealey*, 6 Hare, 620.

(*b*) *Cox v. Champneys*, Jac. 576.

(*c*) *Baylies v. Baylies*, 1 Coll. 537;

Edwards v. Kennedy, V.-C. Wood, Dec. 1853.

(*d*) *Wilkins v. Williams*, 3 Ves. 588.

(*e*) *Perry v. Oriental Hotels Co.*, L. R., 5 Ch. 420.

(*f*) *Wynn v. Lord Newborough*, 3 Bro. C. C. 87.

(*g*) *Ward v. Swift*, 6 Hare, 312.

the court; especially if they arise out of acts improperly done by the receiver of his own authority; and if he be unsuccessful he will not be allowed the costs of such actions (*h*). But if he succeed without putting the estate to the expense of an application, which he might have made for his own security, he has the same right to be indemnified as if he had applied to the court (*i*).

A motion to restrain a receiver from doing acts not within his authority will be rejected with costs, if made by persons who have (*k*) no interest to support it; as the tenants of the estate.

643. It seems (*l*) that the receiver may distrain, at his own discretion, for rent which has accrued within the year; but if more than a year's rent be behind, the order of the court should be obtained. It appears to have been a constant practice of receivers to come to the court, in all cases, on the ground that the distress must be in the name of the owner of the legal estate; but this was said by Lord Hardwicke (*m*) to be unnecessary and inconvenient, because the tenant has an opportunity of removing his goods; and the court does not make an immediate order, but allows a future day: if, however, the legal right be doubtful it would be proper to come to the court. The proper course is, to make the tenants attorn to the receiver, in whose name the distress may then be made (*n*). This will be ordered on motion, and if the tenants oppose on the ground of the pendency of an action commenced before the appointment of the receiver, for the same rent, the motion will be ordered to stand over until the action has been tried. The costs are not given against the tenants in such a case, but it is presumed that they would be subjected to costs, if an improper opposition were made to the

(*h*) *Swaby v. Dickon*, 5 Sim. 631.

(*i*) *Bristowe v. Needham*, 2 Ph. 190.

(*k*) *Wynn v. Lord Newborough*, 3 Bro. C. C. 87.

(*l*) *Brandon v. Brandon*, 5 Mad. 473.

(*m*) *Pitt v. Snowden*, 3 Atk. 750; see *Mitchell v. Duke of Manchester*, 2 Dick.

787. Order for tenant who had not attorned to pay arrears and costs. (*Hobson v. Sherwood*, 19 Beav. 575.)

(*n*) *Hughes v. Hughes*, 1 Ves. jun. 161; 3 Bro. C. C. 87; and the decision of Lord Northington, cited 1 Dick. 120, n.

motion (*o*). The attornment creates a tenancy by estoppel between the tenant and the receiver only, and none between the tenant and the person entitled to the legal estate, so as to enable the latter to distrain (*p*).

644. Where the person in possession refuses to deliver possession to the receiver, it is not necessary in the first instance to make him a party to the suit by reason of its not appearing what is the nature of his interest; but the common direction being, that the tenants shall attorn, the court treats the person in possession as a tenant (*q*); and the course is to move that he may attorn, and the motion will be allowed to stand over, that he may inform the court, whether he be a tenant or not; but unless he show the contrary, it will be assumed, it seems, that he is a tenant, and he will be ordered to attorn accordingly.

Where the person in possession does not hold as a mere tenant, the court will order that possession be given to the receiver (*r*); and, if it be refused, the receiver will be put into possession by the ordinary process of the court; viz. (*s*) by writ of assistance, directed to the sheriff, an order for which may be obtained on motion after due service of the decree or order for delivery of possession, and upon proof of demand and refusal to obey such order; and it is sufficient (*t*), if the affidavit show a refusal during the whole of the time limited by the order for delivery of possession, without showing also a refusal up to the time of making the motion.

The court will also on the petition of the lord order delivery of the court rolls to the receiver by the steward, who holds them only as the lord's agent (*u*).

645. Where a plaintiff, upon whose application the receiver

(*o*) *Hobhouse v. Holcombe*, 2 De G. & S. 208.

(*p*) *Evans v. Mathins*, 3 Jur., N. S. 793.

(*q*) *Reid v. Middleton*, T. & R. 455.

(*r*) *Griffith v. Griffith*, 2 Ves. 401; *Davis v. Duke of Marlborough*, 2 Sw.

108—116, and form there.

(*s*) *Ferguson v. Tadman*, cited 2 Sim. 401; *Green v. Green*, id. 394; XXIX. Cons. Ord. s. 5; see Lord Bac. 9th Order, Beames, Ord. 6.

(*t*) *Webster v. Taylor*, 18 Jur. 869.

(*u*) *Rawes v. Rawes*, 7 Sim. 624.

had been appointed, was proceeding both at law and in equity, the court would not give leave to the receiver to distrain upon the tenants, unless the plaintiff would undertake to proceed in equity only; because the tenants might file bills of interpleader (*x*).

646. It is said to have been ordered (but the decision is queried by the reporter) (*y*), that a receiver might distrain in the names of trustees, both for arrears and as there should be occasion. But the court is slow to invest a receiver with independent powers of taking proceedings, especially if he be a solicitor, or where there is a trustee of the estate; under which circumstances leave was refused to the receiver to bring actions against the consent and in the name of the trustee, against tenants in arrear, and from time to time with the approbation of the master to proceed against tenants in similar circumstances; and a reference was refused, as to the propriety of proceeding in the name of the trustee (*z*).

It is said that an order has been made, that tenants should attorn to sequestrators upon a sequestration for contempt for want of answer, but that the order was not of course, and the court refused to commit the tenants for not obeying the order (*a*).

647. The receiver being appointed for the management of the estate, it was at first the practice (*b*), and was afterwards ordered (*c*), that he should have power to let and set the estate with the approbation of the Master, who was empowered, without the special order of the court, to receive and to report on proposals from the parties interested, for the management or letting of the estate; but the practice was different in the

(*x*) *Mills v. Fry*, Coop. 107. There was some doubt as to the form of the order, because the plaintiff having been already ordered to proceed at law or in equity, it was thought that, proceeding in equity, he had no longer a right to the benefit of the order to elect.

(*y*) *Shelly v. Pelham*, 1 Dick. 120.

(*z*) *Della Cainea v. Hayward*, M'Cle. & Y. 272.

(*a*) *Rowley v. Ridley*, 2 Dick. 622.

(*b*) *Neale v. Bealing*, 8 Sw. 304, n.

(*c*) 64th Order, April, 1828.

case of a sequestrator, because his appointment is only temporary (*d*).

Where a receiver had been appointed over an estate, and had afterwards been directed to include, in his future accounts, the rents and profits of another estate which had been foreclosed, it was held that the Master might report upon the propriety of a proposed lease of that estate under the above order, without a special reference, though the receiver had not been specially appointed over it with power to let and set (*e*); and directions being now given upon these matters by the judges in chambers, the direction for the receiver to manage, let and set, is no longer inserted in the order of appointment (*f*).

648. The receiver ought not to let without the approbation of the court (*g*), even, it would seem, for a single year (*h*); but it appears that he may give a good notice to quit to a tenant from year to year (*i*); for a tenant having held over after such a notice, the Court of Chancery gave the receiver leave to sue for double rent.

He should move for liberty to let the estate before the old lease expires; and although if he neglect to do so he will be at liberty to make what he can of the estate during the current year, he will be visited with any loss which may arise (*h*).

To avoid the necessity for constant applications to the court, for permission to let a colonial estate, an inquiry may be directed beyond what term the receiver shall not be permitted to let (*l*).

The court, allowing no lease to be made which shall bind an infant remainderman, will not even inquire (*m*) whether it will be for the benefit of the parties interested, that the receiver

(*d*) *Neale v. Bealing*, *supra*; *Ray v.*
—, 3 Sw. 306, n.

(*e*) *Duffield v. Elwes*, 11 Beav. 590.

(*f*) Set. ed. 2, 543; ed. 3, 1016.

(*g*) 1 Ves. jun. 139; *Swaby v. Dickon*,
5 Sim. 629.

(*h*) *Wynne v. Lord Newborough*, 1
Ves. jun. 164.

(*i*) See *Wilkinson v. Colley*, Bur.
2694.

(*k*) *Wilkins v. Lynch*, 2 Mol. 499.

(*l*) ——— *v. Lindsey*, 15 Ves. 91.

(*m*) *Gibbins v. Howell*, 3 Mad. 469.

should lease for any number of years, an estate which is settled upon one for life, with remainder over to an infant.

649. Where an estate has come into the possession of, and has been held by, the receivers in a cause, as tenants under an unauthorized lease, and with the acquiescence of such of the parties interested as were able to object, it will be held binding upon the receivers, and they will be ordered (*n*) to pay the arrears of rent, and will be responsible for the dilapidations, the amount of which particulars respectively will be ascertained by inquiry. And this will be done on the petition of the owners of the estate (though no parties to the suit), without driving them to an action; because the court will not study the form of doing justice in a matter arising out of a possession held by itself. In like manner, if a person have entered into an agreement with the court, it will use a summary remedy against him; and has therefore restrained on motion (*o*) a tenant, to whom the receiver had let the estate from year to year, from carrying off crops contrary to the custom of the country, though the tenant was no party to the suit. But the incumbrancer of an annuity, which the receiver was ordered to pay to the annuitant, was refused an order for payment of the annuity, on petition; for that he was a stranger to the suit, and there was no privity between him and the court, or the receiver as its agent (*p*).

650. If the tenant for life of a mortgaged estate, with power to lease, exercise the power *pendente lite*, and after the appointment of a receiver, the lessees are considered, as against prior incumbrancers on the estate, as tenants from year to year to the receiver; and, as such, are entitled to notice to quit. And the receiver may be ordered to let the estate without prejudice to their rights against their lessor, and to

(*n*) *Neate v. Pink*, 15 Sim. 450; 3 Mac. & G. 476.

(*o*) *Walton v. Johnson*, 15 Sim. 352;

and see *Casamajor v. Strode*, 1 Sim. & S. 381.

(*p*) *Wastell v. Leslie*, 15 Sim. 453, n.

bring ejectment against them in case of their resistance to the new letting (*q*).

651. Where the court directs the receiver to give any particular person the option of being tenant, it reserves power to the receiver to inspect the state of the property (*r*).

652. The rents and profits of the estate are bound from the date of the order (*s*), by which some particular person is appointed to fill the office of receiver; but he is not legally clothed with that character nor able to perform its duties, until his recognizances are perfected (*t*).

He is entitled to receive all rents in arrear at the date of his appointment (*u*), and a person, who admits a sum of money to be due from him to the estate, may not dispute the receiver's right to collect it (*x*). But produce which has been already separated from the estate, though not yet converted into money, does not belong to the receiver. Therefore (*u*) where a manager was appointed of a West India estate, with directions to receive and remit the rents and produce, the consignees were not ordered to pay into court the surplus monies arising from the produce of the estate which had been severed, and sent by the mortgagor to the consignees, but had not been received by them at the date of the order. Neither can the receiver claim rent from a person who, being in possession of the estate, has been ordered to pay an occupation rent, in respect of any period prior to such order; from the date of which only his tenancy and liability to payment of rent commences (*y*).

653. The sequestrator of an ecclesiastical benefice is the

(*q*) *Lord Mansfield v. Hamilton*, 2 Sch. & Lef. 28.

(*r*) *Baylies v. Baylies*, 1 Coll. 548.

(*s*) *Defries v. Creed*, 34 L. J., Ch. 607; *Edwards v. Edwards*, L. R., 1 Ch. Div. 454; see *Codrington v. John-*

stone, 1 Beav. 520.

(*t*) *Wickens v. Townshend*, 1 Russ. & M. 361.

(*u*) *Codrington v. Johnstone*, *supra*.

(*x*) *Wood v. Hitchings*, 2 Beav. 289.

(*y*) *Lloyd v. Mason*, 2 M. & C. 487.

mere bailiff or receiver of the bishop, and cannot sue for the profits of the benefice in his own name (*z*).

654. Where an estate is under sequestration, the landlord is entitled to rent, and by the equity of the statute of 8 Anne, c. 14, to arrears, not exceeding one year's rent; payment whereof will be ordered to be made out of the produce of the estate paid into court by the sequestrators (*a*).

655. When possession is taken by a prior incumbrancer, the balance which shall be found due from the receiver, upon passing his accounts, will be ordered to be paid by him to such prior incumbrancer.

656. When the receiver is informed that the defendant has interfered with the rents, he should move for an attachment; and it is sufficient if he swear that he had the information from the tenants, and that he believes it (*b*). The interference of the owner of the inheritance with the rents does not exempt the receiver from being charged with the whole amount, but he must discharge himself by showing what the inheritor received, or hindered him from getting (*c*).

657. Where money comes into the hands of a receiver, appointed in a foreclosure suit, at the instance of the plaintiff, and no particular directions have been given for its application, it belongs in the first instance to the plaintiff, who will be entitled (*d*) to receive it on the dismissal of the suit. And the order for payment may be made on motion after the suit is out of court by the dismissal (*e*). But money in the hands of sequestrators against the estate of a defendant in contempt, is *in custodia legis*, and cannot, without a further order, be applied for the plaintiff's benefit. If incumbrancers come in for examination *pro interesse suo*, and obtain a certi-

(*z*) *Harding v. Hall*, 10 M. & W. 42. The observations of the V.-C. seem to
 * (*a*) *Dixon v. Smith*, 1 Sw. 457. have been misunderstood by the re-
 (*b*) *Anon.*, 2 Mol. 499. porter in *Kay*, xxxvi.
 (*c*) *Hamilton v. Lighton*, id. (*e*) *Id.*; and *Wright v. Mitchell*, 18
 (*d*) *Paynter v. Carew*, 18 Jur. 417. Ves. 292.

ficate that they are prior mortgagees, they are entitled to have possession from the sequestrators; and to have the rents and profits, which have been received by the latter, applied in payment of their mortgage debt after paying the sequestrator's costs, and the costs of the application (*f*).

658. The court will not direct the receiver of an infant's estate to keep down the interest of mortgages until the mortgages have been established, because this would be to assume that the debts were due (*g*).

Of the Receiver's Right to apply to the Court.

659. It has been laid down that, except in case of necessity, the receiver ought not to present a petition (*h*), or to originate any other proceeding in a cause. If an application to the court become necessary, the receiver should apply to the plaintiff, or probably to any other party to the suit at whose instance he may have been appointed, and if after he have done so no application be made, or no proper means be taken to relieve the receiver from his difficulty, he may apply himself, and will then be entitled to his costs. The rule extends to the case where the receiver is a co-petitioner and was referred to by the M. R. where a receiver joined in petitioning for his discharge (*i*): but the observations of Lord Langdale, in the cases cited above, seem to imply that this is a rule of practice at the Rolls, adopted by Sir John Leach, and since followed there, rather than a general rule, and it certainly appears that a different course has been elsewhere followed without observation (*k*) (**696**).

(*f*) *Walker v. Bell*, 2 Mad. 21, and form of order; *Tatham v. Parker*, 1 Jur., N. S. 992; 1 Sm. & G. 506; and see 1 P. Wms. 808-9; 2 Dick. 622; *Delany v. Mansfield*, 1 Hog. 234; *Warren v. Warren*, 13 Ir. Eq. R. 69.

(*g*) *Anon.*, 6 Mad. 9.

(*h*) *Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 id. 497.

(*i*) *Murray v. Earl. of Scarborough*,

Rolls, 17 Nov. 1855.

(*k*) See *Mills v. Fry*, G. Coop. 107, before Lord Eldon; *Wickens v. Townsend*, 1 R. & M. 361, before Lord Lyndhurst; though it was only before the hearing, and not at the presenting of the petition, that his character of receiver was complete. (*Shaw v. Rhodes*, 2 Russ. 539; *Potts v. Leighton*, 15 Ves. 274.)

It is clear that if a party to the cause be appointed a receiver, he does not lose his privileges as a party, and may apply to the court as if he did not hold the office (*l*). And in some cases it is necessary that he should join in the proceeding. Thus, if the receiver pay money in his hands to the solicitors of the plaintiffs, who are also his own solicitors, without precise instructions as to the application of the monies, the money is considered to be paid to them as the solicitors of the receiver and not of the plaintiff; and the receiver must be a party to an application for payment of the money into court by the solicitors (*m*).

Of the Receiver's Possession.

660. The possession of the receiver is the possession of the court (*n*), without whose authority no man may interfere with the receiver, or with property of which he has taken, or has been directed to take, possession (*o*), either directly, by suing out execution, and taking possession against him, by attachment under the garnishee clauses of the Common Law Procedure Act, 1854 (*p*), or by ejectment (*q*), sequestration (*r*), or any other proceeding, whether of an ordinary kind, or authorized by statute (*s*), even though none of the profits be taken (*t*); nor will the receiver's possession be affected by notice given by the mortgagee to the tenants, to pay their rents to him (*u*). And whether the claimant knew, or not, of the appointment of a receiver, or however clear may be his title, he will be restrained from prosecuting his claim if he had not first obtained the leave of the court (*x*). And if he have commenced proceedings without leave, he will be obliged to discontinue them, and must with leave of the court commence de novo (*y*).

(*l*) *Crisp v. Platel*, 2 Ph. 229.

(*m*) *Chater v. Maclean*, 1 Jur., N. S. 175.

(*n*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 104.

(*o*) *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 353.

(*p*) *De Winton v. Mayor of Brecon*, 28 Beav. 200.

(*q*) *Angel v. Smith*, 9 Ves. 335;

Anon., 6 id. 287; *Evelyn v. Lewis*, 3 Hare, 472.

(*r*) *Hawkins v. Gathercole*, 16 Jur. 650; 1 Drew. 12.

(*s*) *Tink v. Rundle*, 10 Beav. 318.

(*t*) *Hawkins v. Gathercole*, *supra*.

(*u*) *Thomas v. Brigstocke*, 4 Russ. 64.

(*x*) *Evelyn v. Lewis*, 3 Hare, 472.

(*y*) *Lees v. Waring*, 1 Hog. 216.

Even, where there is a receiver (to whom the tenants have been ordered to attorn) over the rents and profits of copyholds, the lord may be restrained from an unauthorized proceeding in ejectment against a *terre tenant*, upon seizure *quousque* by the bailiff of the manor for want of a tenant (*z*). Whence it seems that the powers of the receiver override, in this particular, the rights of the lord; and it is the same as to the right of a lessor to recover on a forfeiture, where a receiver has been appointed over the lessee's interest (*a*).

If the receiver improperly pay money, contrary to the order of the court, the person who has received it will be ordered to repay, and the receiver may become liable to the costs of the application. It is not necessary to wait for the passing of the receiver's accounts before applying to the court to prevent him from misapplying money in his hands (*b*).

661. The order of appointment must, however, be so distinct on the face of it, that it may be known of what property the receiver is in possession. Hence, where a receiver was appointed (*c*) of "the incomes of the outstanding property in the pleadings mentioned," under which order the receiver entered into, and remained, in possession of the real estate for several years, and the tenants attorned to him; an application to restrain the legal owner from proceeding against the tenants, without the leave of the court, was refused with costs. The appointment should be over the rents of the particular property, and should be followed by a direction to the owner to deliver possession, or that the tenants should attorn (*d*).

662. There appears to be no direct authority for the committal of a sheriff for the act of his undersheriff, in seizing property which was in the possession of a receiver under the court, where the proceeding cannot be inferred to be the sheriff's per-

(*z*) *Evelyn v. Lewis*, 3 Hare, 472.

(*a*) *Wadmore v. Trevanion*, 3 Hare, 473, cited; and see *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142.

(*b*) *De Winton v. Mayor of Brecon*,

28 Beav. 200.

(*c*) *Crow v. Wood*, 13 Beav. 271.

(*d*) See *Griffith v. Griffith*, 2 Ves. 400; *Davis v. Duke of Marlborough*, 2 Sw. 116; *Metcalf v. Pulvertoft*, Set. Dec., ed. 1, 316.

sonal act. But it is said, that in case of necessity, as where the public safety requires it, the sheriff himself may be committed. In the case cited (*e*), the sheriff and undersheriff having submitted, were ordered on appeal to withdraw, and to pay the costs and expenses of the seizure, and of the application against them in the court below.

The sheriff will also be restrained, if necessary, from compelling the receiver to interplead, and will be ordered to pay the costs of proceedings taken for that purpose; and if the execution creditor be before the court, he will be restrained from proceeding against the sheriff in relation to the property seized by the latter, or any other property in the receiver's possession. If the execution creditor be not before the court this cannot be done, but the sheriff can come to the court for protection if necessary.

And that the execution creditor may not suffer loss by the receiver's possession, in case it shall appear in proceedings taken by the creditor, that his right ought not to have been interfered with by such possession, the receiver may be ordered (*f*) to retain within the bailiwick, for fourteen days, goods, chattels and effects, equal in value to those seized by the sheriff, not exceeding what would be necessary to satisfy the levy in the writ of *feri facias*; such value, if necessary, to be settled in the judge's chambers.

663. It may be observed here, that although a person cannot be committed for a breach of an injunction granted against another, to whose servants and agents the injunction does not extend, yet he may be committed for knowingly assisting in an act which the court has prohibited (*g*). No order *nisi* is necessary on an application to commit a person for taking forcible possession against a receiver (*h*).

The court uses its power of committal sparingly, and only when it is necessary to vindicate its authority; and will not

(*e*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 104.

(*f*) *Id.*

(*g*) *Lord Wellesley v. Lord Mornington*, 11 Beav. 180, 181.

(*h*) *Broad v. Wickham*, 4 Sim. 511; notwithstanding *Van v. Price*, 1 Dick. 91; *Williams v. Johns*, 2 id. 477; and see *Davies v. Cracraft*, 14 Ves. 148.

sanction a motion to commit a person for disturbing a receiver's possession, when it is made long after the act complained of, and not for the protection of the receiver's possession, but to compel payment of his expenses after the question relating to the possession is settled. The proper course is to make such a direct application for the costs, as is warranted by the circumstances (*i*).

Where a receiver, appointed by the court, committed waste in the long vacation, and the parties concerned thereupon discharged him, the court refused, under the circumstances, to grant an attachment against them for thus removing him (*h*).

664. The sheriff who levies under a *feri fucias* issued by the Court, under 1 & 2 Vict. c. 110, is not entitled to the protection of the court, against an action by strangers to the suit, claiming the articles seized; for he is not an officer of the court, though he fills the place which, under the former practice, would have been occupied by the sequestrator. No question arises as to an inquiry at law into the process of the court, and the statute provides no protection for the sheriff (*l*).

665. The court gives leave to a person, who claims an interest in real or personal property paramount to that of a receiver, or of a sequestrator, to bring ejectment, or to come in and be examined *pro interesse suo*; or an inquiry may be directed as to the claimant's interest in the property (*m*). And if he have already brought an action, or have otherwise interfered with the receiver's possession without leave of the court, the order which restrains these acts will also give him leave, or direct him to be

(*i*) Ward v. Swift, 6 Hare, 312.

(*h*) Bell v. Spereman, Sel. Ca. in Ch. 59.

(*l*) Roche v. Cooke, 2 De G. & S. 498; 2 Ph. 691; Try v. Try, 13 Beav. 422; 15 Jur. 809; Onyon v. Washbourne, 14 Jur. 497.

(*m*) Anon. 6 Ves. 288; Angel v. Smith, 9 Ves. 336; Brooks v. Greathed, 1 Jac. & W. 178; Walker v. Bell, 2

Mad. 21; Pelham v. Duch. Newcastle, 3 Sw. 290, n.; Wharam v. Broughton, 1 Ves. 180; Hamlyn v. Lee, 1 Dick. 94; but this case is not accurate; 3 Hare, 469; Gomme v. West, Dick, 472; Reeves v. Cox, 13 Ir. Eq. R. 247. For the practice on orders for examination *pro interesse suo*, see Dan. Ch. Pr. 952, ed. 4.

examined *pro interesse suo*, the plaintiff in the cause being directed to exhibit interrogatories for that purpose (*n*).

The particular mode of proceeding is in the discretion of the court, which considers in what manner the right can best be tried, and which will also, if it be necessary, direct the trial of an issue (*o*). And where the facts are not disputed, but there is only a question of law, which may be fitly decided in court, and no further materials are necessary to enable the court to form its judgment on the question, the person who disputes the receiver's appointment will not be compelled to commence a suit or to come in for examination *pro interesse suo* (*p*). Thus leave has been given (*q*) at the hearing of the claimant's petition, to sue out an *elegit* against a life estate in the receiver's possession. Where it was held that no receiver ought to have been appointed, leave was given (*r*) at the same time to the execution creditor to levy notwithstanding the appointment.

And it seems that in a difficult case, to give time for an appeal, the execution creditor will have leave to levy at the expiration of a certain period, the debtor undertaking in the meantime to keep sufficient property within the bailiwick to answer the demand; or it will be ordered, that the petitioners may levy, unless the amount of the demand be paid into the bank to the credit of the cause, within a week from the service of the order; the money to remain in the bank subject to the order of the court, and the receiver to be at liberty to pay it in (*s*).

Where the prior incumbrancer had been guilty of delay in pursuing his own remedies, the court refused his application, that the receiver, who had been appointed at the instance of the *puisné* mortgagee, should apply the rents according to the priorities; but leave was given to bring ejectment. The ground of this decision was, that the prior mortgagee had no right to that

(*n*) *Jones v. Cloughton*, Jac. 573; *Hamlyn v. Ley*, Set., ed. 2, 629; ed. 3, 1220.

(*o*) *Empringham v. Short*, 3 Hare, 461. This and several of the other cases cited relate to sequestrations, which have been repeatedly declared to stand upon the same footing as those

relating to receivers.

(*p*) Per Parker, C. J., 1 P. Wms. 308; *Dixon v. Smith*, 1 Sw. 457.

(*q*) *Gooch v. Haworth*, 3 Beav. 428.

(*r*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125; 15 Jur. 939.

(*s*) *Id.*

relief on petition which he had sought but had not followed up by another proceeding. But no costs were given against the prior incumbrancer (*t*).

666. The application for leave to proceed notwithstanding the receiver's possession, or to come in for examination *pro interesse suo*, may be made on summons by motion or on petition (*u*), and is usually framed in the alternative—that the receiver may pay the amount of the claimant's demand, or that the latter may be allowed to proceed.

Whether it was regular to except to the report of the master, upon an examination *pro interesse suo*, has been considered doubtful (*x*).

Of the Receiver's Expenditure.

667. It was laid down in the early cases that a receiver in this country could make no expenditure (*y*), or none to any considerable extent (*z*), without the leave of the court, or at least not at the discretion of the receiver (*a*); though greater power was always given to managers of West India estates, which otherwise would be ruined by the expense of remitting part of the produce which might in the first instance be properly applied there (*b*) (**209**). The present course in England, both as to receivers and committees of lunatics, is to direct an inquiry into the circumstances of the expenditure, and whether it was for the benefit of the estate and of the parties interested therein; and if it be found to have been so, or it seems if the trustees of or persons entitled to the estate have directed the expenditure, the amount will be allowed to the receiver (*c*).

(*t*) *Brooks v. Greathed*, 1 Jac. & W. 461.
176.

(*u*) *Angel v. Smith*, 9 Ves. 336;
Dixon v. Smith, 1 Sw. 458; *Gooch v.*
Haworth, 3 Beav. 428; *Potts v. War-*
wick and Birmingham Canal Naviga-
tion Co., Kay, 142; *Russell v. East*
Anglian Railway Co., 3 Mac. & G.
125; *Brooks v. Greathed*, 1 J. & W.
176; *Dan. Ch. Pr.* 1580, ed. 4.

(*x*) *Empringham v. Short*, 3 Hare,

(*y*) *Fletcher v. Dodd*, 1 Ves. jun. 85;
Morris v. Elme, id. 139.

(*z*) *A.-G. v. Vigor*, 11 Ves. 563.

(*a*) *Blunt v. Clitherow*, 6 Ves. 799.

(*b*) *Morris v. Elme*, 1 Ves. jun. 139.

(*c*) *Blunt v. Clitherow*, 6 Ves. 799;
A.-G. v. Vigor, 11 Ves. 563; *Tempest*
v. Ord, 2 Mer. 55. As to committees,
Marton, Exp., *Hilbert, Exp.*, 11 Ves.
397.

But the receiver will not, it seems (for so it was held in the case of the committee of a lunatic), be allowed the amount spent on an estate, in excess of and on a different scale from the expenditure which the court authorized him to make; even though it be certified that the actual expenditure was more beneficial than that which was authorized (*d*). And the costs of the petition will not be given in such a case; though if it be shown that a sum, the expenditure of which the court had authorized, was saved by the new plan, such sum will be allowed to the receiver (*e*).

668. A special direction was not necessary to enable the receiver to propose ordinary repairs to the buildings on the estate, when it was the practice to insert in the decree a power to manage, set and let with the Master's approbation (*f*).

Of the Liabilities of the Receiver.

669. The receiver is not expected, any more than a trustee or executor, to take greater care of the property intrusted to him than he would of his own (*g*); and if he deposit money, which he has received on account of the estate, with a banker of good credit (*h*), in order to remit it more securely than by carrying the specie; or if he otherwise dispose of it with a view to its safety in a manner which would be reasonable if the money were his own, he shall not be liable for the failure of the depositee. But the money ought to be deposited to the credit of the receiver in that character, or to be otherwise earmarked; for if he pay it to his private account with a banker, especially if the banker be one whom he generally employs, he shall be liable for the loss (*i*). The receiver is in a somewhat less favourable position in this respect than a trustee, because he

(*d*) Langham, Re, 2 Ph. 299.

(*e*) *Id.*

(*f*) Thornhill v. Thornhill, 14 Sim.
600.

(*g*) Per Lord Eldon, 1 J. & W. 247.

(*h*) Knight v. Lord Plymouth, 3 Atk.
480; 1 Dick. 120; and see Rowth v.
Howell, 3 Ves. 565.

(*i*) Wren v. Kirton, 11 Ves. 377.

receives a remuneration ; and even a trustee or agent, who acts gratuitously, may be charged with the loss of money paid to his private account (*k*).

670. If the receiver put the fund out of his own control, so that others may deal with it, it has been said (*l*), that he guarantees the solvency of those persons, and becomes answerable for any loss that may ensue: which remark is of course not applicable to a temporary deposit, in the usual manner, with a banker, but was made with reference to a case, in which, for the safety of his sureties, the receiver had agreed that the monies should be deposited with bankers in the joint names of the sureties, and that all drafts should be written by one of the latter, and should be signed by the receiver; who was held liable both in Chancery and in the House of Lords; on the ground, that he, being the person in whom the court confides, has no right to mix up his delegated authority with that of a stranger, nor, by substituting the discretion of the latter for his own, to do that which may prevent him from securing the fund, in a case of emergency. And though the object of the arrangement be to check the receiver, yet he will be answerable for what has happened to the fund which he has so dealt with, not merely where the arrangement can be sworn to be the cause of the loss, but where he has not conducted himself as a prudent person would have done (*m*)

671. A person who, having assumed improperly the character, neglects the duties of a receiver, whilst the parties interested consider him to be acting as such, makes himself responsible for any of the property which is lost through his neglect (*n*). And if rents be paid to a solicitor, in the assumed character of a receiver, he will be ordered to pay them over to the proper receiver, and can claim no lien upon them, either

(*k*) *Massey v. Banner*, 1 Jac. & W. 241; and see *Challen v. Shippam*, 4 Hare, 555.

(*l*) 2 R. & M. 218.

(*m*) *Salway v. Salway*, 4 Russ. 60; 2 R. & M. 215; and in House of Lords as *White v. Baugh*, 9 Bli. N. S. 181.

(*n*) *Wood v. Wood*, 4 Russ. 558.

by virtue of any agreement with a party to the cause, or for his costs (*o*).

672. If the receiver have paid money to the wrong person, and is afterwards obliged to pay the amount into court, and after due application thereof a surplus remains, the court will not pay such surplus over to the person to whom the former payment was wrongfully made, without satisfying the receiver's demands; and it seems that the surplus fund would even be ordered to be repaid to him, if it had been got out of court by fraud or improper concealment (*p*). If, however, the wrongful payment were made by the receiver's agent, the receiver cannot have the benefit of such payment against the surplus fund, except subject to the liabilities of the agent to the person to whom the wrongful payment was made: and the accounts cannot be opened between those parties, on petition of the executor of the receiver, praying for repayment from the person wrongfully paid, or in default from the rents of the estate.

673. The receiver appointed by a colonial court is liable to be sued by the persons to whom the produce of the estate has been directed to be paid, for an account of such produce: and the consignees of the produce to whom express directions have been given for its application are liable to be sued, on the allegation that they are colluding with the receiver for the purpose of satisfying their claims against him, out of monies in their hands received from the estate, and due to the plaintiff; notwithstanding the existence of a remedy at law (*q*).

674. A bill has been held to be properly brought against a receiver, and the owner of the surplus of the rents, out of which the receiver had been directed to keep down the incumbrances, for satisfaction of a judgment debt out of such surplus (*r*); the plaintiff's right to be examined *pro interesse*

(*o*) Wickens v. Townshend, 1 Russ. & M. 361.

(*q*) Fitzgerald v. Stewart, 2 Sim. 333.

(*r*) Lewis v. Lord Zouche, 2 Sim.

(*p*) Gurden v. Badcock, 6 Beav. 157. 388.

suo being held not to interfere with his right to sue; but the receiver is not a necessary party to a bill by a first incumbrancer to establish his rights, and it was said that, but for the case last cited, the bill would have been dismissed against him with costs (*t*).

675. It is neither necessary nor proper to seek to restrain a person by injunction from receiving money from a receiver of the court (*u*). The object should be effected by an order upon the receiver.

676. It has been said (*x*), that if a receiver be appointed by the court upon the application of a mortgagee or other incumbrancer, and the receiver embezzle or otherwise waste the rents, the loss shall fall upon the mortgagor. Lord Chancellor Manners, observing upon this as only a dictum of Lord Thurlow's, distinguished (*y*) the case of a trustee appointed by creditors, upon whom, and not upon the debtor who had executed a deed of assignment, he held that the loss arising from the bankruptcy of the trustee should fall.

677. Upon motion on behalf of a late ward of court, charging that the accounts formerly passed were such as should not bind the applicant, and stating errors and neglect, the receiver was ordered to account again from the beginning (*z*).

Of the Receiver's Remuneration and Allowances.

688. Receivers appointed by the court are directed to be allowed a proper salary for receiving the rents and profits, or, as the case may be, an allowance in respect of the personal estate collected by them (*a*). But although the terms of the order appear to imply a distinction in the nature of the re-

(*t*) *Smith v. Earl of Effingham*, 7 Beav. 357.

(*u*) *Kinder v. Forbes*, 2 Beav. 507, per Lord Langdale.

(*x*) *Rigge v. Bowater*, 3 Bro. C. C. 365.

(*y*) *Hutchinson v. Lord Massarene*, 2 Ba. & Be. 49.

(*z*) *Wildridge v. M'Kane*, 2 Mol. 545.

(*a*) XXIV. Cons. Ord. s. 1.

muneration, the usual practice is to allow a per-centage upon the sums collected or received; but there is no universal rule as to the amount of such allowance. It varies from 2 to 10 per cent., 5 per cent. being generally (*b*) allowed upon rents of freehold and leasehold estates, which allowance is increased to 12 per cent. or upwards, where, from the smallness of the sums to be collected, their payment at short intervals, or other circumstances, the difficulty of collecting them is increased; and may, on the other hand, be much lessened, where there are great facilities for collecting the rents. The same principle is applied to the getting in of other monies, the allowance for which appears to vary from $2\frac{1}{4}$ to $1\frac{1}{4}$ per cent.; though, under particular circumstances, it may be either more or less: and the payment for this duty is sometimes made by a round sum of money. The manager of mines or works is paid sometimes by a salary, and sometimes by a commission on the results.

The receiver's remuneration is settled from time to time when he passes his accounts; but even when paid by a per-centage, he has no vested right to the receipt of monies payable in respect of the estate, entitling him to insist that they shall pass through his hands, where poundage may be saved by a direct payment into court. The occasion of this resolution was an application (*c*) that the receiver might give further security to be answerable for large sums which had become payable; whereupon a cross petition was presented for payment of the money into court. Hence it seems proper to apply at once for payment into court, of all sums of money, the amount of which, if they were to pass through the hands of the receiver, would make further security by him necessary.

In lunacy it seems to be the practice (*d*) to order such monies into court, and not to give the receiver the benefit of the increased poundage, by allowing the funds to pass through his hands.

689. Where the receiver has lost his right to remuneration

(*b*) *Day v. Croft*, 2 Beav. 488.

(*d*) *Clayton, Exp.*, 1 Russ. 476;

(*c*) *Haigh v. Grattan*, 1 Beav. 201.

Cranmer, Exp., id. 477, n.

by omitting to pass his accounts within the proper period, the court will not sanction the allowance of it, if minors be interested (*e*), though their guardians and all other parties consent: and though the delay was caused by the parties themselves in an endeavour to settle the dispute, and, in the meantime, to save the expense of passing the account.

If the receiver's default in bringing in his accounts on the appointed days were known to the parties, and the accounts have been passed, and poundage allowed without objection, no loss having been sustained by the receiver's fault, and no balance being due from him, the court will not afterwards listen to an application to strike out his allowance of poundage and costs at the instance of parties who have had the benefit of his services (*f*); but the amount of the allowance made to a receiver may be re-considered (*g*), where, though an objection was originally made, the particular circumstances of the case and the nature of the items were not taken into consideration.

690. For a voluntary act done by the receiver beyond his ordinary duties, without the authority of the court or of all the parties interested, he will in general be entitled to no extra allowance (*h*), though, if he show that his exertions have been successful in creating a benefit to the estate, the court would consider it inequitable to allow the parties to take the benefit of his exertions without defraying the expenses attending them; upon which principle the receiver will also be allowed the costs incurred in the successful defence of an action, though he had defended it without the leave of the court (*i*) (**642**); but no costs will be allowed of a defence improperly made (*k*), or of a proceeding improperly taken and abandoned, though the re-

(*e*) *Dease v. Reilly*, 4 Dru. & War. 284; see Ord. 23rd April, 1796; 15 Ves. 278; and 148th Gen. Ord. of Court of Chancery in Ireland; but note that the Irish order is more stringent than that of the English court, requiring that no allowance be granted if the account be not duly passed, unless the master certify that the passing thereof ought to be postponed, with his

reasons; and fix a time for passing it. For practice under the Irish order, see *Purcell v. Woodley*, 10 Ir. Eq. R. 422; *Overend v. Overend*, 6 Ir. Eq. R. 387.

(*f*) *Ward v. Swift*, 8 Hare. 139.

(*g*) *Day v. Croft*, 2 Beav. 488.

(*h*) *Ormsby, Re*, 1 Ba. & Be. 189; *Malcolm v. O'Callaghan*, 3 M. & C. 52.

(*i*) *Bristowe v. Needham*, 2 Ph. 190.

(*k*) *Swaby v. Dickson*, 5 Sim. 631.

ceiver acted *bonâ fide* and succeeded in a subsequent proceeding (*l*). A receiver has been allowed the costs as between solicitor and client out of a fund in hand belonging to the incumbrancers, of a hostile application against him, which was dismissed with costs, and was made by a defendant who was wholly unable to pay such costs (*m*).

It is no part of the ordinary duty of a receiver to incur the expense of journeying to and residing in a foreign country whilst prosecuting a suit which he was authorized to commence; and so far as his doing so was unauthorized, and not successful, especially if there were no question of fact or matter of evidence which could call for his presence abroad, he will be disallowed both expenses and remuneration (*n*); and the fact that the court has authorized a particular act, beyond the receiver's ordinary duty, gives no degree of sanction to the repetition of such an act, at his own discretion and without the authority of the court (*o*). Nor will the authority of some only of the persons interested assist the receiver's right against the estate; but the court will rather consider, that, in undertaking the duties in question, the receiver looked only to the personal undertaking of those parties (*p*).

691. The costs of drawing out a scheme of the estate, and of the holdings of the tenants, are chargeable, if at all, as part of the receiver's costs, and not of the solicitor's; but it seems that no allowance would be made to the receiver for such an item, where he is paid by a per-centage, though it may be necessary for the due performance of his duties (*q*).

692. Besides the usual fees payable in the judge's chambers, a further fee of 10*s.* on every 100*l.* received is payable (*r*) for every certificate on the passing of a receiver's and consignee's account; but where the receiver's duties, besides extending to the real and personal estate, comprised the management of the

(*l*) *Montgomery, Re*, 1 Mol. 419.

(*m*) *Courand v. Hanmer*, 9 Beav. 3.

(*n*) *Malcolm v. O'Callaghan*, 3 Myl. & C. 52.

(*o*) *Id.*

(*p*) *Id.*

(*q*) *Catlin, Re*, 18 Beav. 511.

(*r*) Cons. Ord. Sched. 4.

business, and the gross receipts for the year amounted to a very large sum, a special order was made, that instead of the full duty, such a fee should be paid as the judge to whose court the cause was attached should think reasonable (*s*). And in another case (*t*), the special order was for payment of the fee of 10*s.* upon each 100*l.* of net profits.

Of passing the Receiver's Accounts.

693. Receivers' accounts are now passed in the judges' chambers, the accounting party, unless the judge shall otherwise direct, making out and verifying the account by affidavit. The items on each side are numbered consecutively, and the account is referred to by the affidavit as an exhibit, and is left in the judges' chambers. Any person who seeks to charge the receiver beyond the amount of which he has admitted the receipt must give him notice of his intention, stating, as far as he can, the amount sought to be charged, and the particulars thereof, in a short and succinct manner (*u*). A summons is taken out to proceed upon the account, which, when passed, is to be entered by the receiver in books, but the affidavit verifying the account is to refer to it as an exhibit, and is not to be annexed to it (*x*). The rules concerning the time and manner in which the opinion of the judge may be taken upon any proceeding, as to which the chief clerk's certificate has not been signed and adopted by the judge, do not apply to certificates upon passing receivers' accounts, which may be approved and signed by the judge without delay, and upon being so signed, are to be filed and forthwith acted on (*y*). This provision follows the old practice, under which the Master's report of the receiver's account required no confirmation (*z*); and, therefore, did not admit of exceptions. Hence, the court would not enter into the consideration of any items of the account, but would upon the petition of the party complaining,

(*s*) *Wells v. Wales*, 4 De G., M. & G. 816.

(*t*) *Wastell v. Leslie*, id. 818, note.

(*u*) XXXV. Cons. Ord. ss. 33, 34.

(*x*) 15 & 16 Vict. cc. 80, 86; XXIV. Cons. Ord. s. 3.

(*y*) XXXV. Cons. Ord. s. 54.

(*z*) 2 P. Wms. 729; *Shewell v. Jones*, 2 Sim. & S. 170; 3 Russ. 522.

examine any principle upon which the Master had proceeded, where error was imputed to him (a).

694. Upon certificate of the receiver's default in bringing in his accounts, it will be ordered that he bring them in within a limited time (usually four days); and upon his neglecting to do so, the order may be enforced by process of contempt (b). This order may be had by one of several joint receivers against another who is in default. For though the receivers be only bound to account jointly, each of them must bring in his accounts of what he individually receives; and so long as one of them is in default the four day order is of course (c).

Of the Payment of Balances by the Receiver, his Representatives and Sureties, and of the Liability to Interest thereon.

695. The days upon which the receiver is annually (d) or at longer or shorter periods, at the discretion of the judge, to leave and pass his accounts at the chambers of the judge, to whose court the cause is attached, and upon which he is to pay the balance due upon such accounts, or such part thereof as shall be certified to be proper for the receiver to pay, are fixed by the judge and certified by the chief clerk; and upon leaving the account, a summons to proceed thereon is taken out; and such receivers as neglect to deliver their accounts, and to pay their balances, shall be disallowed their salaries, and charged with interest at 5 per cent. upon the balances, so long as they remain in their hands; and the court may discharge the receiver, and appoint another in his place. Every receiver, acting under the authority of the court, is in every year to direct his annual account of receipts and payments respecting the estate intrusted to his care to be examined and settled, within six months after the time appointed for delivery

(a) *Shewell v. Jones*, supra. In Ireland, objections are entertained to the amount of the items, though no erroneous principle be adopted. (*Beytagh v. Concannon*, 10 Ir. Eq. R. 351.)

(b) *Dan. Ch. Pr.* 1590, ed. 4.

(c) *Scott v. Platel*, 2 Ph. 229.

(d) XXIV. Cons. Ord. ss. 2, 3; XXXV. id. s. 23.

of the account, and his neglect to do so is directed to be certified.

696. Although the receiver is bound by his recognizance, only to account yearly, he has no right to make interest for his own benefit, upon monies received in the intervals between the passing of his accounts. If any such sums be received, he ought to apply for an order to pay them into court, that they may be made productive for the benefit of the estate (*e*).

So if the receiver be directed to lay out the surplus rents and profits, when they shall amount to a competent sum, with the approbation of the court, or from time to time to pay the money into the bank, he ought not to wait until some person obtains an order for investment or payment, but may pay in the money on his own application (*f*); and he has been said in this case to be rather in the position of an executor, receiving capital sums, than of a receiver of rents and profits. And under, or by analogy to, the General Order of 23rd April, 1796 (*g*), (upon which, and the 63rd Order, April, 1828, the present Orders are founded,) the receiver who neglects to make the payments in pursuance of the order in that behalf, may be deprived of his salary and charged with interest; not, however, upon each sum as it came to his hands, but as an executor, and with regard to the circumstances under which he has kept the monies in his hands.

697. The defence, that the circumstances of the estate made it necessary to keep large sums in hand, will not prevent an inquiry as to what sums might or ought to have been reasonably laid out at interest; and upon such sums, when ascertained, interest will be charged at 4 per cent. (*h*). And in other cases, and even after the accounts have been passed, and all parties

(*e*) *Shaw v. Rhodes*, 2 Russ. 539;
Foster v. Foster, 2 Bro. C. C. 616; and
 see *Earl Lonsdale v. Church*, 3 Bro.
 C. C. 41.

(*f*) *Hicks v. Hicks*, 3 Atk. 274;
Potts v. Leighton, 15 Ves. 278.

(*g*) See 15 Ves. 278.

(*h*) *Hicks v. Hicks*, 3 Atk. 274.

satisfied, inquiries have been directed, and interest has been enforced against receivers who have kept monies in their hands (*i*). But after the accounts have been passed, and the balances paid in without any application for interest, or excuse suggested for the omission to apply, it seems (*k*) that if a case can be made at all for opening the accounts, with the view of charging the receiver with interest on balances retained in his hands, the costs of the proceedings would be thrown upon the applicants; and where a prior attempt by another party to charge interest on some of the same balances had failed, the subsequent application was altogether refused.

698. It was laid down before the making of the Order of 1796, that a receiver should pay interest, if he kept money in his hands a quarter of a year after it ought to have been paid into court (*l*). Where a receiver had been very irregular in passing his accounts, which were so prepared, that neither the Master, nor the parties interested, could ascertain what was the real balance in the receiver's hands (payments having been made out of the balances between the days to which the respective accounts were made up, and those upon which they were carried in), inquiries were directed (*m*), as to the amounts of the balances in his hands upon several days in past years, and as to the sums due to the incumbrancers at those times, and the payments made to them. And the receiver was ordered to carry in his future accounts on or before a fixed day in every year, leaving at the same time an affidavit, setting forth the particulars of his receipts and payments between the day to which the account was made up, and that upon which it was carried in; and setting forth the true balance then in his hands.

699. A receiver who does not pay into court the balance certified to be in his hands, pursuant to an order, may be

• (*i*) *Fletcher v. Dodd*, 1 Ves. jun. 85; ——— *v. Jolland*, 8 Ves. 72; see *Dawson v. Raynes*, 2 Russ. 466.

(*k*) *Ward v. Swift*, 8 Hare, 139.

(*l*) *Fletcher v. Dodd*, 1 Ves. jun. 85.

(*m*) *Bertie v. Lord Abingdon*, 8 Beav. 53.

committed upon affidavit of personal service, or his recognition may be put in suit (*n*); but, in the former case, the order will be that the receiver do pay the balance within a week after personal service of the order, or stand committed.

The same remedies appear to be available against a receiver after he has been discharged, or after the cessation of his powers. If having been discharged, he have made default in payment of his balance, he will be ordered to pay it in with the amount of his salary and interest on both sums at 5 per cent. from the day first appointed for payment (*o*).

And, after dismissal of the suit, the receiver may be ordered on petition in the cause to pass his accounts and pay the balance due (*p*).

700. The admission by the executor of a receiver, of assets to answer what is due from his testator, in respect of rents received by him, is sufficient ground (*q*) to make the executor liable to pay such interest as the receiver's estate may be charged with in respect of the monies produced by the rents retained in his hands; and if the executor have petitioned to pass the accounts and pay the balance due, but have neglected the payment, he cannot be heard to say that he had no assets. But, in a case of *laches*, the executor will only be ordered to pay into court the principal money and costs of the application (*r*).

701. If the receiver die, a balance being due from him, the court has no jurisdiction to order his executor to bring in and pass the accounts, and to pay the balance out of the receiver's assets (*s*). It seems that an action must be instituted to compel such an account (*t*); but perhaps the order for pay-

(*n*) *Davies v. Cracraft*, 14 Ves. 143.

(*o*) *Harrison v. Boydell*, 6 Sim. 211.

(*p*) *Pitt v. Bonner*, 5 Sim. 577.

(*q*) *Foster v. Foster*, 2 Bro. C. C.

616.

(*r*) *Gurden v. Badcock*, 6 Beav. 157.

(*s*) *Jenkins v. Briant*, 7 Sim. 171.

The case of *Littleboy v. Spooner*, Set. 1022, ed. 3, was by consent; see 15 Sim. 483.

(*t*) 15 Sim. 482; 3 Mac. & G. 176.

ment might have been made, if the balance had been ascertained and the prayer for payment had not been joined to the prayer for an account(*u*). The parties interested in the fund may come to the court, either against the representatives or the surety of the receiver, and they must in the first place apply against both, to avoid the objection which each might raise to the absence of the other. The court, therefore, without deciding which of these parties are primarily liable, will order on petition that the deceased receiver's recognizances may be enforced against his real and personal representatives and sureties, notwithstanding an alternative prayer that the personal representatives may pass the accounts(*x*).

It had been laid down, on the authority of the registrars, to be the practice not to put the recognizance in suit against the surety in default of payment by him of the amount due, without the amount being first ascertained, except where the receiver had absconded; and that a breach of the recognizance, by non-payment of the balance due by the receiver, must be shown as ground for liberty to put the recognizance in suit; but Lord Truro thought that the recognizance may also be enforced against the surety in the case of a deceased receiver, without ascertaining the amount due, where there were no means of ascertaining or enforcing the claim; treating the case of an absconding receiver as put by the registrars only as an example of an exceptional case in which it was difficult to ascertain the amount due(*y*).

702. The recognizances being given to the Master of the Rolls, and the senior(*z*) Vice-Chancellor for the time being, cannot be enforced without the leave of the court, and the enforcing them is in the discretion of the court(*a*). The surety, however, will be responsible for all acts of fraud or collusion on the part of the receiver, and(*b*) generally, to

(*u*) 3 Mac. & G. 180.

(*x*) *Ludgater v. Channell*, 3 Mac. & G. 175.

(*y*) *Id.*; and see 15 Sim. 482.

(*z*) *Dan. Ch. Pr.* 1593, ed. 4; XLII.

Cons. Ord. s. 13.

(*a*) 3 Mac. & G. 178.

(*b*) See *Dawson v. Raynes*, 2 Russ. 466; 3 Jo. & Lat. 254.

the extent of the recognizance, for whatever sum of money, whether principal, interest or costs (*c*), the receiver has become liable; including, where the recognizance is conditioned to be void if the receiver duly perform his duties, and account, the costs of his removal, and of the appointment of a new receiver in his place (*d*); it being the surety's duty to see that the accounts are duly passed; but under particular circumstances, as where (*e*) the receiver had been known to have been long bankrupt, and no steps were taken to pass his accounts, the surety may be excused payment of interest.

703. Where an action is brought against the surety, he may properly apply for an order for an account of what is due, and that he may pay the amount, not exceeding the amount of his recognizance, to the credit of the cause, and thereupon that the proceedings at law may be restrained; and he has been allowed to take such an order for payment by instalments, but the costs of the application and of the consequent proceedings fall on the surety, and cannot be deducted (*f*).

704. The surety is entitled to stand in the receiver's place for all monies due to the latter in account with the estate (**1343**); and if there be money in court which has been ordered to be paid to a receiver who has been discharged, the surety may bring his action; and upon motion, the receiver or those who claim under him may be restrained from taking the money out of court, without discharging the surety's claim. But where the surety filed his bill upon the same day on which the receiver assigned his estate to a trustee for his creditors, the plaintiff was put upon the terms of making the trustee a party to the suit (*g*).

Of the Discharge of the Receiver.

705. The receiver being appointed for the benefit of all the parties interested (**603**), the court will not generally discharge

(*c*) Lockey, Re, 1 Ph. 509, the case of a committee.

(*d*) Maunsell v. Egan, 3 Jo. & Lat. 251; Kelly v. Murphy, San. & Sc. 479.

(*e*) Dawson v. Raynes, 2 Russ. 466.

(*f*) Walker v. Wild, 1 Mad. 528.

(*g*) Glossop v. Harrison, G. Coop. 61; 3 Ves. & B. 134.

him on the mere application of the party at whose instance he was appointed (*h*). But if upon payment of the plaintiff's debt, the suit be dismissed, or proceedings in the suit be ordered to be stayed (*i*), it seems that as a general rule the receiver must be discharged; for with the plaintiff's rights fall the rights of the other parties. And this was held even against incumbancers, whose rights were prior to those of the plaintiff (*k*). But it was held (*l*) in Ireland, where there were prior creditors, parties to a suit, with whose claims the court by appointing a receiver had interfered, that their rights would be protected by continuing the receiver, upon the terms that the persons so protected should forthwith file a bill.

And in like cases in England, proceedings have been stayed (*m*), without prejudice to the order appointing the receiver.

A receiver appointed for the protection of property during the minority of several infants will not be discharged as to the share of one of them who has attained full age; the object of the appointment not having been fully effected (*n*).

706. Where an estate was vested in trustees, who were willing to perform the duties of the receiver without salary, they were substituted for him, for the purpose of applying the rents and profits as the receiver had been ordered to apply them; and upon their undertaking to account in the usual way: and they were not required to enter into recognizances (*o*).

707. The receiver cannot generally be discharged on his own application, where his appointment has been completed, without showing reasonable cause for the change (*p*); nor, unless it be shown to be for the benefit of the parties to the cause, or for other good reason, will the sureties be dis-

(*h*) *Bainbrigge v. Blair*, 3 Beav. 421.

(*i*) *Davis v. Duke of Marlborough*,
2 Sw. 168; *Paynter v. Carew*, 18 Jur.
417.

(*k*) *Davis v. Duke of Marlborough*,
supra.

(*l*) *Murrough v. French*, 2 Mol. 498.

(*m*) *Damer v. Earl of Portarlington*,
2 Ph. 30; *Paynter v. Carew*, 18 Jur.
417.

(*n*) *Smyth v. Lyster*, 4 Beav. 227.

(*o*) *Bainbrigge v. Blair*, 3 Beav. 421.

(*p*) *Dan. Ch. Pr.* 1600, ed. 4.

charged (*q*): and the joining of the sureties in the application, either for the receiver's discharge or their own, will have no weight, unless it be shown to be for the benefit of the parties to the cause (*r*).

Infirmity, which prevents the receiver from properly discharging his duties, and ill health, increased by the anxieties of the office, afford a sufficient excuse for his discharge; and he will be allowed to deduct the costs of and incidental to the application for discharge, out of the balance in his hands (*s*). It is also a good reason for discharging a surety on his own application, that he had become such in breach of his partnership articles (*t*).

708. It seems that a charge of misbehaviour against a receiver, for suffering the owner of the estate to remain in part possession to the prejudice of the estate, will not be admitted (*u*) as a reason for discharging the receiver; because the parties themselves have caused the loss by not compelling the owner, by the authority of the court, to deliver possession to the receiver.

But he is liable to be discharged for irregularity in carrying in his accounts, and for making it necessary to compel him to do so; and for so framing his accounts that the amount of the balance in his hands cannot be ascertained (*x*).

709. The appointment of a receiver in the place of sequestrators discharges the sequestration (*y*).

710. The application to discharge and to vacate the recognizances of the receiver may be (*z*) by petition or motion, or by summons in chambers; or the direction may be given in the decree or order on further consideration. Being a mere officer of the court, he ought not to appear upon the application for

(*q*) *Griffith v. Griffith*, 2 Ves. 400;
and see *Hamilton v. Brewster*, 2 Mol.
407.

(*r*) *Griffith v. Griffith*, *supra*.

(*s*) *Richardson v. Ward*, 6 Mad. 266.

(*t*) *Swain v. Smith*, Set., ed. 2, 548;

ed. 3, 1021.

(*u*) *Griffith v. Griffith*, *supra*.

(*x*) *Bertie v. Lord Abingdon*, 8 Beav.

53.

(*y*) *Shaw v. Wright*, 3 Ves. 24.

(*z*) *Dan. Ch. Pr.* 1601, ed. 4.

his discharge, although he have been served with the petition; and he will not be allowed the costs of appearance (*a*).

It has been laid down (*b*) that if the order direct the payment of the balance into court, the same order may direct the recognizance to be vacated on payment of the balance, which will be shown by the certificate of the Paymaster-General. But if the payment be directed in any other manner than into court, the payment must be proved, and a second petition (which, however, need not be mentioned in court) must be presented for the order to vacate the recognizance. It is said (*c*), however, that the latter rule is not now followed, but that the recognizance will be (at once) vacated upon a proper affidavit of payment to the party entitled to receive the balance, as well as upon the Paymaster-General's or Chief Clerk's certificate.

711. Where the recognizances were enforced against the surety to recover monies due from the receiver, the court would not at first discharge the recognizance on the application of the surety, who had paid the debt to the solicitor prosecuting the proceedings; such payment being thought to be insufficient, though it was admitted that the solicitor was authorized to receive the money, and though the plaintiff had been served with the petition and did not object: but the order was made (*d*) after the plaintiff had been served with notice that it would be made on a subsequent day unless cause were shown, and did not appear.

712. Notice of an application to discharge a receiver ought to be served personally upon him; and such service will not be dispensed with unless an order for substituted service be first obtained (*e*).

713. A receiver who has been discharged, and does not pay

(*a*) *Herman v. Dunbar*, 23 Beav. 312.

(*b*) *Lawson v. Ricketts*, 11 Beav. 627.

(*c*) *Sett.*, ed. 2, 549; ed. 3, 1023.

(*d*) *Mann v. Stennett*, 8 Beav. 189.

(*e*) *A.-G. v. Haberdashers' Company*, 2 Jur. 915.

in his balance as directed, is subject to the order of 1796 (696), and will be ordered to pay in the balance, with the amount of his salary, and interest at 5 per cent. on both sums, from the day first appointed, as well as the costs of the motion (*g*).

714. When a receivership has been completed, the book containing the accounts is to be deposited in the Office of the Clerks of Records and Writs (*h*).

CHAPTER V. PART 4.—OF POSSESSION BY THE CREDITOR OF THE SECURITY; AND HEREIN OF THE RELATIVE RIGHTS OF THE MORTGAGOR, THE MORTGAGEE, AND THEIR TENANTS.

715. *Of the relative Rights of the Mortgagor and Mortgagee and of their Tenants, incident to the Possession of immoveable Property.*

745. *Of the Rights and Liabilities incident to the Creditor's Possession of personal Chattels.*

715. After the execution of the mortgage, the mortgagor is usually allowed to retain possession of the estate, until, upon default in payment of interest the mortgagee finds it necessary to use the remedies given him by the security. A right to this possession is often specially secured to the mortgagor, and in the absence of such a provision, the legal mortgagee may enter immediately after the execution of the mortgage, by virtue of the estate thereby vested in him (*i*); an express power of entry after default being also usually given (*h*): and under the Land Transfer Act, 1875, subject to any entry to the contrary on the register, the registered proprietor of a registered

(*g*) *Harrison v. Boydel*, 6 Sim. 211.

(*h*) XXIV. Cons. Ord. s. 4.

(*i*) See *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553. But a mere power to sell on default, does not give a right to enter before sale. (*Watson v. Waltham*, 2 A. & E. 485.)

(*k*) The mortgagee may bring eject-

ment under such a power, although a term has been vested in a trustee by way of further security. (*Doe d. Butler v. Kensington*, 8 Q. B. 429.) And the power may be executed although a bill of exchange have been given for the debt. (*Bramwell v. Eglinton*, 5 B. & S. 39, per Blackburn, J.)

charge may, for the purpose of obtaining satisfaction of any monies due to him under the charge at any time during the continuance thereof, enter upon the land charged or any part thereof, or the receipt of the rents and profits thereof, subject to the right of any registered prior incumbrancers, and to the liability of a mortgagee in possession (*l*).

Under these various circumstances, the mortgagee's position towards the mortgagor, or other persons in the actual possession of the mortgaged property, under tenancies commencing either before or after the date of the mortgage, sometimes becomes the subject of doubtful and difficult questions.

716. The rights of the mortgagee under these circumstances will be considered,

FIRST, as they affect persons claiming under tenancies created before the date of the mortgage, and to which it is therefore subject.

SECOND, as they affect the mortgagor himself, when he remains in possession after the date of the mortgage, either without or with any express provision enabling him to do so in the mortgage deed.

THIRD, as they affect persons claiming under tenancies, or other interests created by the mortgagor, after the date of the security, and either without or with the concurrence of the mortgagee.

And it is to be noted with respect to the second and third of these divisions of the subject, that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person, even though the latter may have a right to recover possession (*m*); and it makes no difference though the mortgagors be trustees, acting in a public capacity, and not for their own benefit (*n*). But a subsequent mortgagee, who has acquired the legal estate without notice of a prior equitable mortgage,

(*l*) 38 & 39 Vict. c. 87, s. 25.

(*m*) Per Lord Mansfield, 1 T. R. 760, n.; 2 H. Cowp. 600.

(*n*) Doe *d.* Levy *v.* Horne, 12 L. J.

(N. S.) Q. B. 72; notwithstanding dictum in *Fairtitle v. Gilbert*, 2 T. R. 171, explained *id.*

may set it up notwithstanding it was acquired by the mortgagor under whom he claims, after the execution of the prior security (*o*).

717. *Firstly*,* then, where the tenancy commences before the mortgage. By the conveyance the reversion passes to the mortgagee, and with it the right to receive the future rents, and the other rights incident to the estate which theretofore belonged to the mortgagor (*p*). The tenant may nevertheless safely pay the rent to the mortgagor (provided it be rent due and not a payment by anticipation on account of rent (*q*)), so long as he is allowed by the mortgagee to receive it; for though the conveyance is effectual, as to the grantee's rights against the tenant, without any attornment (*r*) by the latter, the tenant is not prejudiced by payment of the rent to the grantor, or by breach of any condition for non-payment of rent before notice of the grant (*s*).

718. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have

(*o*) *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278. As to the form of averment under which the estoppel may arise, *Id.* and *Heath v. Crealock*, L. R., 10 Ch. 22.

(*p*) *Trent v. Hunt*, 9 Exch. 14; per Lord Denman in *Rogers v. Humphreys*, 4 Ad. & E. 299. Arrears of rent do not pass without express words. (*Salmon v. Dean*, 3 Mac. & G. 314; 15 Jur. 641.)

(*q*) *De Nicholls v. Saunders*, L. R., 5 C. P. 589; *Cook v. Guorra*, 7 id. 132.

(*r*) 4 Ann. c. 16, s. 9. Attornments made in consequence of some judgment at law, or decree or order of a court of equity, or to any mortgagee after mortgage forfeited, are excepted from the attornments by tenants to strangers, which are made void by 11 Geo. 2,

c. 19. The tenant of a mortgagor, who does not give him notice of ejectment brought by the mortgagee to enforce attornment, is not liable to the penalties of sect. 12 of the same statute for secretory ejectments. (*Buckley v. Buckley*, 1 T. R. 647.) And a mortgagee is not allowed to come in and defend as a landlord in ejectment under the statute unless he is interested in the result of the suit. (*Doe d. Pearson v. Roe*, 6 Bing. 613; 4 Mo. & P. 437.)

(*s*) 4 Ann. c. 16, s. 10. But if he pay the rent to the mortgagor, after notice to pay the mortgagee, and is afterwards compelled to pay the latter, the payment being voluntary, cannot be recovered from the mortgagor. (*Higgs v. Scott*, 7 C. B. 63.)

been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (*t*).

Before the passing of the above act the mortgagor, being no longer the owner of the reversion, could not sue the tenant in ejectment (*u*); he might, however, always distrain for the rent, in the name and as the bailiff of the mortgagee, under an implied authority from him to enforce payment of the fund out of which his interest may be paid. And even though he distrained as for rent due to himself, he might justify as the bailiff of the mortgagee (*v*). The like authority is implied in favour of the owner of the equity of redemption, who has paid off the mortgage, on an undertaking for a transfer of the security (*x*).

719. When, on the other hand, the mortgagee gives notice to the tenant holding under a tenancy prior to the mortgage, he becomes entitled to, and may distrain or sue for, the rent in arrear since the mortgage, and also for that which subsequently accrues (*y*); and this whether the tenant holds under a lease, or from year to year; or he may sue a tenant claiming under an agreement for a lease made by the mortgagor for use and occupation (*z*); and even if, after the mortgage, the terms of the holding have been varied as to the amount of rent by agreement between the tenant and the mortgagor: such an agreement being considered not to alter the relative positions of the mortgagee and the tenant, but to be adopted by the former as the act of an agent, and to entitle him to recover the additional as well as the original rent (*a*).

(*t*) Supreme Court of Judicature Act, 1873 (c. 66), s. 25 (5); Act of 1874 (c. 83), s. 2.

(*u*) *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065.

(*v*) *Trent v. Hunt*, 9 Exch. 14.

(*x*) *Snell v. Finch*, 9 Jur., N. S. 333; 13 C. B., N. S. 651.

(*y*) *Moss v. Gallimore*, Dougl. 279.

(*z*) *Rawson v. Eicke*, 7 A. & E. 451; 2 N. & P. 443.

(*a*) *Burrowes v. Gradin*, 1 Dowl. & L. 213.

720. The mortgagor, after the mortgagee has taken possession, has no remedy in equity against the tenant in respect of rent alleged to be due from him, but for which the mortgagee has refused to apply (*b*). His only remedy is against the mortgagee on taking the accounts.

721. Secondly. The relation between the mortgagor himself and the mortgagee, where the former remains in possession of the mortgaged estate, without any express provision that he should do so, has been the subject of much discussion, arising less from any real question as to the relative rights of the parties, than from the embarrassment caused by the technical effect of the words by which the relation has been attempted to be defined—an embarrassment which has led one learned judge to declare, that it was very dangerous to define the precise relation in which the mortgagor and mortgagee stand to each other in any other terms than those very words (*c*); another, that one is much at a loss as to the proper terms in which to describe the relation (*d*); and a third, that it is sufficient to call them mortgagor and mortgagee, without having recourse to any other description of men, or to what they are most like; their rights, powers and interests being as well settled as any in the law (*e*). It will, therefore, be sufficient to say that the mortgagor in possession, under such circumstances, is not, as he was sometimes called, tenant at will to the mortgagee, seeing that he is not, like a tenant at will (*f*), entitled to the crops growing on the land at the end of the tenancy, and that he may be ejected without notice or demand of possession (*g*): nor yet the mortgagee's bailiff or receiver, because not obliged to account to him for the rents (*h*). By Lord Mansfield the mortgagor was said to be tenant at will quodam modo (*i*), and he has been said to be tenant *by*, as distinguished from tenant *at*, sufferance; but these definitions barely mark without explaining

(*b*) *Salmon v. Dean*, 14 Jur. 235.

(*c*) Per Lord Denman, 11 A. & E. 314.

(*d*) Per Patteson, J., 5 A. & E. 297.

(*e*) Per Buller, J., 1 T. R. 383.

(*f*) See *Temple, Exp.*, 1 G. & J. 216, where the mortgagor was held entitled

to the crops as tenant at will by express contract.

(*g*) See per Buller, J., 1 T. R. 388; per Lord Tenterden, 8 B. & C. 767.

(*h*) 1 T. R. 383.

(*i*) Dougl. 282.

the distinctions which they imply. The likeness of the mortgagor's interest to that of a tenant at sufferance is so far correct, that it agrees with his position as one who comes in by right, and holds over without right (*k*); but, following the caution of Lord Mansfield, that nothing is more apt to confound than a simile, the mortgagor in possession may be described as one who, having parted with his estate, remains in possession at the pleasure and consistently with the right of the grantee, exercising the ordinary rights of property; including, it seems, the right of holding courts where lord of a manor (*l*); receiving the rents for his own use; entitled by statute to vote in respect of the mortgaged property, in elections for knights of the shire and other members to serve in parliament (*m*); and able to bring trespass in respect of immoveable, and trover in respect of moveable, property against any one save the mortgagee (*n*); yet liable at the option of the mortgagee to be treated either as a tenant or as a trespasser; in the one character to be sued for injuring the reversion (*o*): in the other to be ejected without notice, demand of possession or claim to rents in arrear or accruing, or to the growing crops (*p*).

722. The mortgagor is not the tenant at will of the mortgagee, within the meaning of the provision in the Statute of Limitations, that when any person shall be in possession or

(*k*) Lord Ellenborough, 3 East, 440; Lord Tenterden, 8 B. & C. 767; 1 Smith's L. C., note to *Keech v. Hall*. See *Doe d. Fisher v. Giles*, 5 Bing. 421; 2 M. & P. 749.

(*l*) 1 Scriven, 91, n., ed. 4; 73, n., ed. 5.

(*m*) 8 Hen. 6, c. 7; 2 Will. 4, c. 45, s. 23; 6 & 7 Vict. c. 18, s. 74. The monthly payments secured by mortgage to trustees of a benefit building society under 6 & 7 Will. 4, c. 32, are a charge on the estate which will destroy the owner's right to vote, if they do not leave him the quantity of interest prescribed by statute. (Copland, app., *Bartlett*, resp., 6 C. B. 18.) The mortgagor in possession is also a person who hath or holdeth lands or tene-

ments within the Statute of Sewers (23 Hen. 8, c. 5, s. 3), and may be fined for the non-repair of sea banks. (*The Queen v. Baker*, L. R., 2 Q. B. 621.)

(*n*) *Sellick v. Smith*, 11 Mo. 459; 4 L. J., C. P. 194.

(*o*) *Partridge v. Bere*, 5 B. & Al. 604; *Hitchman v. Walton*, 4 M. & W. 409.

(*p*) *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Trent v. Hunt*, 9 Exch. 14; *Doe d. Higginbotham v. Barton*, 11 A. & E. 307; 3 P. & D. 194; *Doe d. Fisher v. Giles*, 2 M. & P. 749; 5 Bing. 421; *Doe d. Griffith v. Mayo*, 7 L. J., K. B. 84; *Jolly v. Arbuthnot*, 4 De G. & J. 224; 5 Jur., N. S. 80, 689; 28 L. J., Ch. 547.

receipt of the rents and profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action, shall be deemed to have first accrued at the determination or at the expiration of one year next after the commencement of such tenancy (*q*).

723. We have next to consider those cases in which the mortgagor remains in possession under the express provisions of the security, and the effect created by any special remedies thereby given to the mortgagee against the rents of the estate. Sometimes a mere power is given to the mortgagee to enter and receive the profits of the land, which is in truth no more than the mortgagee may do under the conveyance (*r*); but the mortgage also often contains a power of distress, and provisions, under which, either directly or constructively, the relation of landlord and tenant is created between the mortgagor and mortgagee. A simple instance of a constructive tenancy arises where there is a provision that the mortgage shall not be called in till the expiration of a given term, and that until default in payment it shall be lawful for the mortgagor and his heirs peaceably to enjoy and receive the rents (*s*); this amounts to a re-demise by the mortgagee to the mortgagor during the term fixed. The result is not the same where the covenant is, that the mortgagee may enter *after* default, which is held not to imply that the mortgagor may remain in possession *until* default, but only to leave the mortgagee up to that period to rest upon his title under the conveyance, and afterwards to give him also the benefit of the covenant (*t*). In considering these questions, the courts have been guided by the authority of Sheppard's Touchstone, in

(*q*) 3 & 4 Will. 4, c. 27, s. 7.

(*r*) See *Doe d. Roynance v. Lightfoot*, 8 M. & W. 553.

(*s*) *Wilkinson v. Hall*, 3 Bing. N. C. 508; 4 Sc. 301.

(*t*) *Doe d. Roynance v. Lightfoot*, 8 M. & W. 553; *Rogers v. Grazebrook*, 8 Q. B. 895. So the distinction has been taken, that under a proviso that

the mortgagee shall not meddle with the possession of the premises or the receipt of rents till default of payment, the mortgagor is only tenant at sufferance, but tenant at will under a covenant that he should take the profits till default of payment. (*Powseley v. Blackman*, Cro. J. 659.)

which it is laid down (*u*), that "if A. bargain and sell his land to B. on condition to re-enter if he pay him 100*l.*, and B. doth covenant with A. that he will not take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease:" for want, adds Mr. Preston, of a more formal contract, and also for want of certainty of time. "And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land, until the day of payment of the money, in this case, albeit the time be certain, yet this is no good lease but a covenant only;" since, says the learned editor, the words are negative only and not affirmative.

Therefore, though the words used imply some right of possession in the mortgagor, they will not amount to a re-demise to him, unless, as in *Wilkinson v. Hall* cited above, some certain time be fixed during which the mortgagor is to hold (*x*). So that no demise is created by a covenant that the mortgagee shall not sell or lease without a month's notice demanding payment and default thereon; and for want of this certainty, doubt has been cast upon a decision in which, on mortgage by husband and wife of her land to secure an annuity, upon trust to permit her to receive the rents, until default for sixty days in payment of the annuity, the estate was held to have been re-demised to the mortgagor until default (*y*). And

(*u*) Vol. 2, 272.

(*x*) *Doe d. Parsley v. Day*, 2 Q. B. 147; 2 G. & D. 757, explaining *Wheeler v. Montefiore*, 2 Q. B. 133, which was an action of trespass by a mortgagee by way of underlease against the sheriff, who entered under an execution against the mortgagor, and pleaded that plaintiff was not possessed. There was a proviso for redemption on a certain day, and that on non-payment the plaintiff might enter, but no covenant that the mortgagor might remain in possession till the day fixed. The verdict was for the plaintiff, which was afterwards held to be wrong; and it was said that his right to possession did not accrue till the day fixed for redemption, which implied

a right in the mortgagor till that time; but the reason was also given, and is now taken to have been the ground of the decision, that a lessee before entry cannot maintain *trespass*.

(*y*) *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. See also *Gale v. Burnell*, 7 Q. B. 850, where an assignment of chattels, with a proviso that in case of payment on a certain day; or on an earlier day as the mortgagee should appoint by ten days' notice in writing, with interest in the meantime, the assignment should be void; and that after default the mortgagee might take possession and sell, but that the mortgagor might hold till default: it was held that there was nothing to defeat the original grant, or to operate as a re-demise.

apparently on the same principle where upon or after default the mortgagor was to hold of the mortgagee as tenant, it was held that the mortgagee could not distrain for rent without first giving the mortgagor notice of the intention to treat him as a tenant (z).

724. Although a tenancy may be created by sufficient words in the deed, it will not be allowed where the effect would be inconsistent with the general object of the deed. Such an inconsistency was held to arise, where the object of the deed being to secure certain payments, the grantors were to retain possession and take the rents until default; and yet it was provided that they should hold as tenants at will to the mortgagee at a rent, subject to a power of re-entry in case of non-payment, and to all usual covenants and remedies in leases; and the latter provision was rejected, because it would have subjected the mortgagors to a distress for rent, before default in payment of the debt intended to be secured, and even before that debt became due (a).

725. Under a tenancy created by an attornment, or agreement, there may be a right of distress, by force of the intention of the parties, or by estoppel, though it appear on the face of the deed that the person to whom the mortgagor attorned, being a mere receiver, or not in possession of the legal estate, has no reversion to which the power of distress could be incident; and

(z) *Clowes v. Hughes*, L. R., 5 Exch. 160.

(a) See *Walker v. Giles*, 6 C. B. 662, as explained in cases cited below; *Pinhorn v. Souster*, 8 Exch. 768. And see remarks on *Walker v. Giles* in *Turner v. Barnes*, 2 B. & S. 435, where it was held, that, assuming the tenancy created to be a tenancy at will, and therefore to have ceased at the death of the mortgagor, the mortgagee was not justified in distraining afterwards upon his widow who remained in occupation; it being necessary, under the statute 8 Ann.

c. 14, s. 7, to distrain during the possession of the tenant from whom the arrears became due, and that the wrongful distress did not become good by relation when the widow afterwards became the administratrix of the mortgagor.

And as to the extent to which the attornment clause will operate, having regard to the construction of the mortgage, see *Pinhorn v. Souster*, *supra*; *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Hampson v. Fellows*, L. R., 6 Eq. 575; L. J., 37 Ch. 694.

though the holder of the legal estate be no party to the deed (*b*) (66).

726. Notwithstanding the existence of apt words for the creation of a tenancy, the mortgagee may retain his ordinary power of ejectment, in that character, if his ordinary rights be reserved. Therefore, where, in one case (*c*), a yearly rent was reserved, not exactly corresponding with the interest, with power for the mortgagee to use such remedies as landlords have on common demises, the expressions used being properly applicable to cases of landlord and tenant; and in another (*d*), where the mortgagor, by the deed, attorned tenant to the mortgagee at a rent; a proviso in the first that the right to enter and evict the mortgagor after default should not be prejudiced by the reservation of rent, and in the latter a power of re-entry in case of default, were held to entitle the mortgagee to eject the mortgagor without notice to quit or demand of possession, though in one case the mortgagee by distraining had treated the mortgagor as his tenant (*e*).

727. A tenancy between the mortgagor and mortgagee is

(*b*) *Jolly v. Arbutnot*, 28 L. J., Ch. 547; 4 De G. & J. 224; 5 Jur., N. S. 80, 689; *Morton v. Woods*, L. R., 4 Q. B. 293; L. J., 38 Q. B. 81.

(*c*) *Doe d. Garrod v. Olley*, 12 Ad. & El. 481.

(*d*) *Doe d. Snell v. Tom*, 4 Q. B. 615.

(*e*) In cases arising out of the same transaction which came before the Courts of Queen's Bench and Exchequer, and in which the mortgagee had a power of entry on default, the mortgagor attorned to the mortgagee as tenant from year to year at a rent, to the intent that he might have, for recovery of interest, the same powers of entry and distress as by law are given to landlords for recovery of rent in arrear; the mortgagor remained in possession for more than a year, and the mortgagee after default assigned. It was held in

the Queen's Bench in trespass, that the mortgagee could not, after assignment, enter and distrain for arrears of interest due before assignment, the deed not creating a mere licence to seize, but a tenancy, under which there could be no distress after conveyance. But the Court of Exchequer held, that the tenancy from year to year, if any were created, was only for the purpose of giving a right to distrain, and that the whole matter was overridden by the mortgagee's right of entry. (See *Brown v. Metropolitan Life Assurance Society*, 28 L. J. (Q. B.), 236 and *Metropolitan Life Assurance Society v. Brown*, id. (Exch.) 340; 4 H. & N. 428.) The result appears to be, that however convenient may be the powers of distress and tenancy clauses, they should always be accompanied by, and made subject to, a special right of entry on default.

not created (*f*) by the mere grant of a power to the mortgagee to distrain for interest in arrear (which may be given whether the mortgagor have or have not the legal estate, he being in possession (*g*)), even though he be empowered to distrain as for rent reserved by lease; the word "rent" in such a case not requiring the existence of a tenancy, but being used only to direct the mode of dealing with the distress. The grant may operate as a rent-charge where the estate is not conveyed by the security, or vested in the mortgagee, as in the case of a covenant to surrender copyholds; but upon the admittance of the mortgagee, the rent-charge will necessarily cease, and the grant will thenceforth operate only as a covenant, enabling the mortgagee to seize such goods as are on the premises when the distress is made, and to treat them as if distrained (*h*).

728. The nature of the tenancy will depend upon the language and intention of the deed; and the reservation of a yearly rent will not necessarily create a tenancy from year to year. A covenant for quiet enjoyment by the mortgagor, as tenant at will to the mortgagee, on payment of a yearly rent, will create only a tenancy at will at a yearly rent, though coupled with a proviso that no possession should be taken till the expiration of twelve months after notice of such intention to the mortgagor: no certain term being thereby created (*i*). And an agreement by the mortgagor to become tenant during the will and pleasure of the mortgagee, at a rent payable on certain days in every year, will also create a tenancy at will, with rent payable at the rate of so much a year (*j*). The same effect may be produced by a power in the mortgagee to enter at any time without notice, although the tenancy be nominally created for a term of years (*k*).

(*f*) *Doe d. Wilkinson v. Goodier*, 10 Q. B. 957.

(*g*) *Chapman v. Beecham*, 3 A. & E. 723. It seems that a mere personal licence to distrain cannot be transferred. (*Brown v. Metropolitan Life Assurance Society*, 28 L. J. (Q. B.) 236.)

(*h*) *Freeman v. Edwards*, 2 Exch. 732.

(*i*) *Doe d. Dixie v. Davis*, 7 Exch. 89; 16 Jur. 44.

(*j*) *Doe d. Barstow v. Cox*, 11 Q. B. 122; 11 Jur. 991.

(*k*) *Morton v. Woods*, L. R., 4 Q. B. 293; 38 L. J., Q. B. 81.

Where the estate was devised by the mortgagee, to whom the mortgagor had attorned tenant at a rent, and the mortgagor remained in possession and paid rent, the subsequent occupation connected with the provisions of the deed, was held (*l*) to constitute the relation of landlord and tenant, and to entitle the devisees to distrain, though receipts for the rent were given as interest, and the deed was executed by the mortgagor only.

729. Under separate attornments by mortgagors (who are partners) in respect of their undivided moieties, the mortgagee cannot by means of simultaneous distresses upon the goods of each of them, take such as belong to them in common (*m*).

730. As to property to which the mortgagee has no claim, as furniture in a mortgaged house, which has become vested in the mortgagor's assignees in bankruptcy, if the tenant after notice from the mortgagee pay him the whole rent, the tenant may be sued again for the use of that in which the mortgagee had no interest (*n*); for either the rent may be apportioned, or, upon the entry of the mortgagee, a new agreement may be inferred by the jury for the letting of the different kinds of property at several rents.

731. The mortgagor cannot determine the tenancy at will, by transferring his interest to another, without notice to the mortgagee, so as to affect his right to distrain (*o*); and it seems that a tenancy at will which existed before the mortgage will not be determined by the mortgage (*p*).

732. The County Court Acts, which enable (*q*) landlords to recover possession in County Courts of small tenements, only contemplate (*r*) the ordinary case of landlord and tenant, and are therefore not applicable to that of mortgagor and mort-

(*l*) *West v. Fritche*, 3 Exch. 216.

(*m*) *Parke, Exp.*, L. R., 18 Eq. 381.

(*n*) *Salmon v. Matthews*, 8 M. & W. 827.

(*o*) *Pinhorn v. Souster*, 8 Exch. 763.

(*p*) *Doe d. Goody v. Carter*, 9 Q. B. 863.

(*q*) 9 & 10 Vict. c. 95, s. 122; 19 & 20 Vict. c. 108, ss. 50–56.

(*r*) *Jones v. Owen*, 18 Jur. 261.

gagee, unless a tenancy have been actually created between them. But all actions of ejectment where neither the value nor rent of the property shall exceed 20*l.* by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements or hereditaments are situate (*s*).

733. *Thirdly.* The mortgagor, being unable to confer upon another a greater right than he himself possesses, his tenant claiming under a demise of whatever kind, made after the mortgage, without the privity of the mortgagee, is, like his lessor, liable to be ejected without notice; and he has no remedy but against the mortgagor (*t*), whom a Court of Equity will not compel to pay off the mortgage for the purpose of perfecting the lease. The lessee in such a case was formerly left to his remedy at law, but was afterwards given damages in equity, unless it appeared that he came into equity only for damages, knowing that he had no case for specific performance (*u*).

734. Besides being liable to eviction by the mortgagee, or, if he pay rent to him, to have his own interest reduced at the utmost to that of a tenant from year to year, the tenant of the mortgagor after the mortgage, if called upon to pay rent to the mortgagor before he has paid it to the mortgagee, is liable to a distress by the former, whose title he is estopped from disputing. To escape from this double liability he is justified in giving up possession to the mortgagee upon his requiring payment of the rent, and threatening to enforce his rights upon refusal; and these acts of the mortgagee amount to a disturbance of the lessee in the enjoyment of the demised property, and an eviction, sufficient to support an action against the mortgagor upon his covenant for quiet enjoyment: the lessee's right to sue being unaffected by the circumstance

(*s*) County Courts Amendment Act, 1867, 30. & 31 Vict. c. 142, s. 11.

(*t*) *Keech v. Hall*, Dougl. 21; *Thunders d. Weaver v. Belcher*, 3 East, 449; *Gibbs v. Cruikshank*, L. R., 8 C. P.

454. Per Lord Denman in *Rogers v. Humphreys*, 4 A. & E. 299.

(*u*) *Costigan v. Hastler*, 2 Sch. & Lef. 160; *Howe v. Hunt*, 31 Beav. 420.

that he has obtained from the mortgagee compensation for improvements (*x*).

735. But the mortgagee cannot bring trespass for mesne profits against a tenant who has come in after the mortgage, where (*y*) the mortgagee has not been in actual possession of the land. If he have obtained a verdict, or the defendant have suffered judgment by default in ejectment, the production of the record in the action will be evidence of the plaintiff's possession at the time of the demise; and he may recover the mesne profits subsequent to that date: but as to the profits prior to the demise, he must prove such a title, accompanied by possession, as would enable him to maintain an ordinary action of trespass.

Nor can the mortgagee distrain, or bring an action for rent under such circumstances, so long as the relation of landlord and tenant does not exist between him and the person in possession. If he recognize him as his own tenant he cannot afterwards treat him as a trespasser (*z*); and the effect of the recognition is not to set up a lease for years made by the mortgagor, but to create a new tenancy from year to year between the mortgagee and the lessee (*a*).

736. Neither a mere notice to the tenant, requiring him to pay rent to the mortgagee, without an attornment or other evidence of consent by the tenant, nor an authority to him from the mortgagor to pay rent to the mortgagee, though communicated to and acted upon by the tenant, will make him the tenant of the mortgagee, or entitle the latter to distrain for the subsequent rent (*b*); and a subsequent attornment by the tenant will not set up the mortgagee's title by relation from

(*x*) *Carpenter v. Parker*, 3 C. B., N. S. 206.

(*y*) *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Litchfield v. Ready*, id. 989.

(*z*) *Birch v. Wright*, 1 T. R. 378.

(*a*) *Doe d. Hughes v. Bucknell*, 8

Car. & P. 566; *Partington v. Woodcock*, 5 Nev. & M. 672.

(*b*) *Evans v. Elliott*, 9 A. & E. 342; 1 P. & D. 256; *Wheeler v. Branscombe*, 5 Q. B. 373; *Hickman v. Machin*, 5 Jur., N. S. 576; 4 H. & N. 716. And see *Doe d. Downe v. Thompson*, 9 Q. B. 1037.

the time at which a previous notice was given (*c*). Nor is the change of tenancy established only by proof of payment of interest, as such, by the person in possession of the land (*d*). But it has been held to be effected if the mortgagee, or his agent, call on the mortgagor's tenant to pay, and he actually pays, the interest of the mortgage, instead of rent to the mortgagor (*e*). And the recognition of the tenancy is a matter of evidence, and may be inferred from other acts—as, it seems, by a notice to the tenant to quit at the expiration of his tenancy (*f*), or if the mortgagee encourage the tenant to lay out money on the property (*g*). But where the mortgagor leased to a person who laid out money on improvements, it was held that the occasional inspection by the mortgagee of the improvements was not sufficient evidence of his acceptance of the lessee as his tenant (*h*).

Where the lease was neither prior nor subsequent to, but contemporaneous with, the mortgage, because made under a power created by the same instrument, it was held that the notice of the mortgagee to the tenant in possession, entitled him to rents due at the time of the notice, and gave a right to distrain for them (*i*).

737. Although the subsequent lease be thus void as against the mortgagee, yet, as the tenant cannot dispute his landlord's title, the lease will be good against him until the mortgagee interferes (*h*); until which time the mortgagor may receive the rent for his own use, and may even distrain for it when unpaid.

And the tenant's interest by estoppel may be converted into a lease in interest by the conveyance of the mortgagee; so that a purchaser from the mortgagor will under such circum-

(*c*) *Evans v. Elliott*, 9 A. & E. 342.

(*d*) *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473.

(*e*) *Doe d. Whitaker v. Hales*, 7 Bing. 322; 5 Moo. & P. 132.

(*f*) *Smith v. Eggington*, L. R., 9 C. P. 145, per Keating and Grove, JJ.

(*g*) *Evans v. Elliott*, *supra*, per Lord Denman; *Keech v. Hall*, *supra*, per Lord Mansfield.

(*h*) *Doe d. Parry v. Hughes*, 11 Jur. 698.

(*i*) *Rogers v. Humphreys*, 4 A. & E. 299.

(*k*) *Trent v. Hunt*, 9 Exch. 14.

stances have a remedy against the lessee after the mortgage, on his covenants (*l*).

738. The mortgagor's interest by estoppel also passes by descent to his heir, and by purchase to an assignee, who may sue the tenant upon the covenants in the lease; and this although the estates of the mortgagor and mortgagee were both equitable, if the terms of the conveyance be sufficient to pass an estate in fee, to which the reversion by estoppel as against the lessee is considered to be equivalent (*m*). But there is no estoppel where the lease discloses that the land is mortgaged, and that the lessor has only an equity of redemption (*n*). The lessee's covenants are then only in gross, and cannot be sued upon by the assignee of the lessor. And where the assignee of the mortgagor also acquires the legal estate from the mortgagee, who was not privy to or estopped by the lease, the assignee will not be bound by it, though he have received rent from the tenant (*o*).

739. After the mortgagee has obtained payment of the rent, the tenant, in defending himself against a subsequent action by the mortgagor, is still not allowed to deny the mortgagor's title; he must admit it, and then show that it has been determined, and that he has been compelled to make the payment to the mortgagee (*p*); or if the payment were by the mortgagor's consent, the plea may be *riens en arrière* (*q*). A

(*l*) *Webb v. Austin*, 7 M. & G. 701; 8 Sc. N. R. 419.

(*m*) *Cuthbertson v. Irving*, 5 Jur., N. S. 740; 6 id. 1211; 4 H. & N. 742; 6 id. 135. But the tenant is not estopped from disputing the title of an unadmitted mortgagee of copyholds, because estoppel will not operate upon an equitable estate. (*Rayson v. Adcock*, 9 Jur., N. S. 800; *Doe d. North v. Webber*, 3 Bing. N. C. 922; 5 Sc. 189.)

(*n*) *Pargeter v. Harris*, 7 Q. B. 708; *Cuthbertson v. Irving*, *supra*. In *Saunders v. Merryweather*, 3 H. & C. 902, it was held, that the assignee of the

lease might show that the mortgagor was not the legal owner of the reversion; for though the mortgage did not appear on the face of the assignment of the lease, the latter recited an assignment of the mortgage, which recited the mortgage itself.

(*o*) *Doe d. Downe v. Thompson*, 9 Q. B. 1037.

(*p*) *Alchorne v. Gomme*, 2 Bing. 54; 9 Mo. 180. See *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065; 3 N. & M. 193.

(*q*) *Dyer v. Bowley*, 2 Bing. 94; 9 Moore, 196, per Park, J.

plea of payment to the mortgagee upon his demand, and threat to put the law in force in case of refusal, is in substance a plea of payment, and good, being a recognition of the mortgagor's right and an admission that the rent alleged to have been satisfied was due to him (*r*). But a plea, that before the demise the owner mortgaged, and that the mortgagee gave notice, the tenant attorned, and the mortgagee distrained, amounts to a denial of the right to demise (*s*); and a plea of notice and claim by the mortgagee, without an averment of consequent payment of the rent to him, is insufficient (*t*).

740. The doctrine of estoppel against the tenant does not apply in such a case as an action by a mortgagor against a tenant for breach of agreement in not delivering up fixtures at the end of the term, when the mortgagee, after that time and before action by the mortgagor, has given notice and required payment of the rent; and the mortgagor can only recover damages for the detention of the fixtures between the end of the term and the date of the mortgagee's notice (*u*).

741. A mortgagor to whom power is reserved to grant leases until entry by the mortgagee may lease to a trustee for himself; being within the exception as to dealings between persons filling fiduciary positions, which allows a tenant for life with power to sell or lease to execute the power to his own trustee (*x*).

742. The mortgagee is equally unable to grant a valid lease

(*r*) *Taylor v. Zamira*, 6 Taunt. 524; *Johnson v. Jones*, 9 A. & E. 809. And see *Wilton v. Dunn*, 17 Q. B. 294; 15 Jur. 1104.

(*s*) *Alchorne v. Gomme*, *supra*.

(*t*) *Wilton v. Dunn*, *supra*.

(*u*) *Watson v. Lane*, 11 Exch. 769, and per Pollock, C. B., the tenant was only estopped to the extent of the interest granted by the lease, and not after the termination of the lease; and the

doctrine of estoppel against a tenant is peculiar to the action of ejectment. But in *Delaney v. Fox*, 2 C. B., N. S. 768, the tenant was said to be estopped, whether the landlord was asserting his title by ejectment at the end of the term, or defending an action of trespass at a future period.

(*x*) *Bevan v. Habgood*, 1 Jo. & H. 222.

for years of the mortgaged estate without the concurrence of the mortgagor (*y*). If he agree to make a lease with the consent of the mortgagor, who afterwards refuses to concur, the lessee will not be allowed to insist upon a lease from the mortgagee alone; because the lessee himself may be deprived of it on redemption by the mortgagor, to whom also the mortgagee may be made liable for wilful default if the lease be shown to have been improvident; and where the state of the title was known to the lessee, it seems he would have no right to damages (*z*). Whether he can insist upon a lease from the mortgagee alone, when he was not privy to an intention that the mortgagor should concur, has been doubted; but it is submitted that in such a case there should be no specific performance of a contract which the mortgagor may render nugatory, and that the relief should be in damages only.

743. Where a lease by the mortgagee is confirmed by the mortgagor, and a power of re-entry is reserved to them, or either of them, to re-possess as of his and their former estate; as the mortgagor and mortgagee cannot have a joint interest, the right enures to the benefit of the person having the legal interest for the time, that is, to the mortgagee while his interest lasts, and to the mortgagor when his commences; but they cannot sue on a joint demise (*a*). So if rent be expressly made payable to the mortgagee during the continuance of the mortgage, and afterwards to the mortgagor, the covenant is several, and an action will be well brought by persons claiming under the mortgagee, without joining the mortgagor (*b*). And as a joint lease by mortgagee and mortgagor operates as a lease by the mortgagee, with an equitable confirmation by the mortgagor, who is in law a stranger to the estate, a covenant

(*y*) *Hungerford v. Clay*, 9 Mod. 1. Unless, it was said, in case of necessity to avoid apparent loss.

(*z*) *Franklin v. Ball*, 33 Beav. 560; 10 Jur., N. S. 606.

(*a*) *Doe d. Barney v. Adams*, 2 Cr. & J. 232; 2 Tyr. 289.

(*b*) *Harrold v. Whitaker*, 11 Q. B. 147.

by him as incident to the demise cannot be implied, and he cannot be sued jointly with the mortgagee (c).

744. If the covenants in the joint lease are only with the mortgagor and his assigns, an assignee of the mortgagee cannot sue for breach of the covenants, because they are collateral to, and do not run with, his interest in the land (d); but the mortgagor for the same reason, though the reversion be extinguished, may sue the lessee on the covenants (e).

Where in the joint lease the covenants are with the mortgagee, who has the legal reversion, jointly with the mortgagor, who has none, the covenants run with the land, and may be sued upon by the joint covenantees (f).

*Of the Rights and Liabilities incident to the Creditor's
Possession of Personal Chattels.*

745. The mortgagee of personal chattels may bring trover or trespass in respect of them, if, when the cause of action accrued, he had a right to immediate possession. This right is complete, if there be an assignment to the mortgagee not qualified by any clause which gives the mortgagor a right to continue in possession until default in payment on demand; nor limited as to the right of possession till some other future time, which, not having arrived till the goods are taken by a third person, the mortgagee is then unable to require possession of them (g). If he have that legal right, though it be coupled with a trust to permit the mortgagor to hold till demand of the debt, it will be sufficient to support the action; the trust being consistent with a right of possession in the mortgagee (h); and the right is not affected by the giving

(c) *Smith v. Pocklington*, 1 Cr. & J. 445.

(d) *Webb v. Russell*, 3 T. R. 393.

(e) *Stokes v. Russell*, id. 678. See *Thwaites v. M'Donough*, 2 Ir. Eq. R. 97.

(f) *Wakefield v. Brown*, 9 Q. B. 209; *Magnay v. Edwards*, 17 Jur. 839.

(g) 2 Roll Abr. 21, 22. *Bradley v.*

Copley, 1 C. B. 685; *Wheeler v. Montefiore*, 2 Q. B. 133. The purchaser of chattels cannot sue for them in trover while the vendor's lien for the purchase-money remains unsatisfied. *Lord v. Price*, L. R., 9 Ex. 54.

(h) *White v. Morris*, 16 Jur. 500; 11 C. B. 1015.

a bill of exchange on account of the debt, although the bill have been indorsed over for value (*i*).

But if the mortgagor, being in possession after the mortgage, disable himself by a voluntary and wrongful act from delivering the chattel to the mortgagee, the latter may bring trover against the purchaser, who can acquire no title by the wrongful act of the mortgagor (*k*).

746. The mortgagee may also recover in trover against a bailee, to whom the chattel was delivered by the mortgagor, before the mortgage; and therefore (*l*), after demand by the mortgagee, the bailee is justified in refusing to re-deliver the chattel to the mortgagor, notwithstanding his contract to do so, made before his situation was changed by the mortgage.

747. If a mortgage of chattels be subject to a proviso for redemption, on payment at a certain day, or at such earlier day as the mortgagee shall appoint by notice, the notice given must be sufficient to allow the mortgagor a reasonable time to obtain the money, and not illusory, as a half-hour's notice (*m*); that being only equivalent to payment on demand, for which the parties, if they had desired to do so, might have expressly provided: and even a covenant to pay immediately on demand will be so construed as to allow the debtor a reasonable opportunity to comply with the demand (*n*). If, however, he bring his action for a wrongful taking of the goods, for want of reasonable opportunity allowed for payment on demand, the damages will only be for the value of his interest in the goods at the time of seizure, and not for their actual value, for the creditor would otherwise be deprived of the benefit of the security.

748. The pledgee of a negotiable security may recover and

(*i*) *Bramwell v. Eglinton*, 5 B. & S. 39.

(*k*) *Cooper v. Willomatt*, 1 C. B. 672.

(*l*) *European, &c. Co. v. Royal Mail, &c. Co.*, 8 Jur., N. S. 136.

(*m*) *Brighty v. Norton*, 3 B. & S. 305; 32 L. J. (N. S.) Q. B. 38.

(*n*) *Toms v. Wilson*, 32 L. J. (N. S.) Q. B. 382; 4 B. & S. 442, 455.

receive the money due thereon, suing for it in his own name; but generally he has no right to compromise the claim for less than is due upon the security; and if he do so, he will be bound to account to the pledgor for the full value (*o*).

749. The general rights and liabilities which are incidental to the mortgagee's possession of the mortgaged estate are for the most part brought in question in taking the accounts between the parties, and will therefore be fully explained in the chapter relating to that subject (**1503**). But the possession of chattels, whether by way of mortgage, pledge, or lien, involves considerations peculiar to the nature of those forms of security, and which may be conveniently referred to in this place.

750. The pawnee of chattels is bound to restore the pledge upon payment of the debt (*p*); but is not liable in trover if he refuse to deliver it upon tender by some only of several tenants in common or joint tenants (*q*). He must use ordinary diligence and is liable for ordinary neglect in the care of it; and the default for which he is responsible extends as well to acts of omission as of commission (*r*). If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because by detaining them after the tender of the money he is a wrongdoer and a wrongful detainer of the goods, and the special property of the pawnee is determined (**80**); and a man who keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss (*s*). Hence Story confines the liability to cases in which the same loss or accident would not otherwise inevitably have happened (*t*).

751. As to the pawnee's liability in cases of theft, it is laid

(*o*) Story, Bailments, § 321.

(*p*) Story, Bailments, § 332; Jones, Bailments, 75; Glanvill, bk. 10, c. 8.

(*q*) Harper v. Godsell, L. R., 5 Q. B. 422.

(*r*) Story, Bailments, § 342.

(*s*) Per Holt, C. J., in Coggs v. Bernard; Lord Raym. 909; Southcote's case, 4 Rep. 88 b.

(*t*) Bailments, § 341.

down (*u*) that theft per se establishes neither responsibility nor irresponsibility in the bailee; if the theft be occasioned by negligence, the bailee is responsible; if without negligence, he is discharged. Ordinary diligence is not disproved even presumptively by mere theft, but the proper conclusion must be drawn from weighing all the circumstances of the particular case.

752. Under the Pawnbrokers' Act, 1872, where a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker shall nevertheless be liable, on application within the period during which the pledge would have been redeemable, to pay the value of the pledge, after deducting the amount of the loan and profit, such value to be the amount of the loan and profit, and twenty-five per cent. on the amount of the loan.

A pawnbroker shall be entitled to insure to the extent of the value so estimated (*x*).

If a person entitled and offering to redeem a pledge shows to the satisfaction of a court of summary jurisdiction that the pledge has become or has been rendered of less value than it was at the time of pawning thereof, by or through the default, neglect or wilful misbehaviour of the pawnbroker, the court may, if it thinks fit, award a reasonable satisfaction to the owner of the pledge in respect of the damage, and the amount awarded shall be deducted from the amount payable to the pawnbroker, or shall be paid by the pawnbroker (as the case requires) in such manner as the court directs (*y*).

If a pawnbroker, without reasonable excuse (proof whereof shall lie on him), neglects or refuses to deliver a pledge to the person entitled to have delivery thereof under the act, he shall be guilty of an offence against the act, and a court of summary jurisdiction may, if the court thinks fit, with or without imposing a penalty, order the delivery of the pledge on payment of the amount of the loan and profit (*z*). •

(*u*) Story, Bailments, § 338; Kent, 2 Comm. pp. 580, 581. And he adds: "I think it would be going quite far enough to hold, that such a loss is *prima facie* evidence of neglect, and

that it lies with the pawnee to destroy the presumption."

(*x*) 35 & 36 Vict. c. 93, s. 27.

(*y*) Id. s. 28.

(*z*) Id. s. 31.

753. The liability of the holder of a chattel by way of lien, to preserve it, appears to be the same as the ordinary liability in the case of a pawn. Some difficulty was felt in the allowance of a lien where the detention of it would cause expense to the claimant—the chattel being a mare, detained to answer the charge for covering—because of the question who should be liable for the feeding; but the difficulty was solved by reference to the analogous case of a distress kept in pound covert, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate; and to the case of a lien on corn, which requires labour and expense in the proper custody of it (*a*).

The holder under a lien may, however, deal with the goods in a reasonable way to maintain his right; and a shipping agent, claiming a lien on goods for the cost of transport, has therefore been held to be justified in bringing them back from the foreign port to which they had been sent, on non-payment of the charges (*b*).

754. The holder of a chattel under a lien, or, it is conceived, by way of pledge, cannot require payment for the use of the place in which the chattel is detained, or otherwise for keeping it. Nor can a right to such a payment be acquired under a lien by a notice that it will be demanded; and if the payment be made under protest to regain possession of the chattel, the money may be recovered by action (*c*), as may also a sum paid in excess of what is justly due in respect of the debt for which the chattel is detained (*d*).

755. Although the pawnee of a chattel cannot generally make a profit by it (*e*), yet, taking a special property in it by

(*a*) *Scarfe v. Morgan*, 4 M. & W. 284.

(*b*) *Edwards v. Southgate*, 10 W. R. 528.

(*c*) *Somes v. British Empire Shipping Co.*, 8 H. L. C. 338; 1 El. Bl. & Fl. 353; *Dimsdale v. London and Brighton Railway Co.*, 3 Fost. & F. 169, n. See *Thames Ironwork Co. v.*

Patent Derrick Co., 1 J. & H. 93. But Lord Ellenborough seems to have thought that an analogous right could be maintained after a reasonable time and notice to remove the chattel. (*Hartley v. Hitchcock*, 1 Stark. 408.)

(*d*) *Ashhole v. Wainwright*, 2 Q. B. 837.

(*e*) *Langton v. Waite*, 16 W. R. 508.

the act of the pledgor, he acquires with the possession a certain right of user, which does not belong to one whose possession (as in the case of a distress) arises by act in law (*f*). The pawnee's right of user depends upon the nature of the chattel, and the extent to which the use of it may be beneficial, injurious or indifferent to its due preservation (1504). The result of the authorities upon this subject is thus stated by Mr. Justice Story (*g*):—

1. If the pawn be of such a nature that the due preservation of it requires some use, the use is not only justifiable but is indispensable to the faithful discharge of the duty of the pawnee.

2. If the pawn will be the worse for the use, as in the case of the wearing of clothes, the use will be prohibited (*h*).

3. If the keeping of it be a charge to the pawnee, as in the case of a cow or horse, it may be used by way of recompense: the cow may be milked, and the horse ridden (*i*).

4. If the use will be beneficial to the pawn, or indifferent, it may also be used. The instances of this suggested by Sir W. Jones are in the one case a setting dog, and in the other books (*k*).

5. If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, the use of it is impliedly interdicted.

Upon this latter point the law was somewhat differently stated by Holt, C. J. (*l*), who is followed by Sir W. Jones.

(*f*) *Mores v. Conham*, Owen, 123.

(*g*) Story, *Bailments*, §§ 329, 330.

(*h*) See also *Mores v. Conham*, *supra*, per Daniel.

(*i*) *Id.*; per Cook, Warburton and Daniel.

(*k*) Jones, *Bailments*, 81.

(*l*) *Coggs v. Bernard*, Lord Raymond, 909; Jones, 81. Under the Mohammedan law, there is, according to the *Hedaya*, a right to the possession only, and not to the usufruct of the pawn; and if the pawnee sell, let out or pledge the pawn, he commits a transgression for which he must make reparation (the pledge beyond the

amount of the debt being a trust), but no dissolution of the contract takes place. The distinction between the use and preservation of the pawn is curiously illustrated by the example of a ring, for the loss of which the pawnee is responsible if he wear it on his little finger, which is a use; but not if he wear it on any other finger, which is considered to be a means of preservation, because it is contrary to the customary mode of wearing a ring. So of a sheet, which he may spread over his shoulders, but may not wear in the usual manner. (Pawns, Ch. 1.)

Using as an illustration the pawn of jewels to a lady, he says that *she might use them*; but then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is because the pawn is in the nature of a deposit, *and as such is not liable to be used*. The passage seems to be contradictory, and is too doubtful an authority for the conclusion that goods not liable to injury by mere use may be used by the pledgee at his peril. The distinction, however, between a liability arising from the use of a pledge which ought not to be used, and from its use where it can be lawfully used only at the peril of the pledgee, is probably of little practical importance.

756. The right of the mortgagee to make use of a ship is not precisely like that of the pawnee of an ordinary chattel, who, under the second of the above mentioned rules, would evidently be prevented from using it; though the keeping it unused for any length of time would hardly be less injurious than its employment.

The question is affected both by the higher nature of the interest of a mortgagee, and by the provision of the Shipping Act (*m*), that the mortgagee shall not by reason of his mortgage acquire, nor the mortgagor lose, the character of owner, except so far as may be necessary for making the ship or share available for payment of the mortgage debt. A right of user may of course be created by express agreement, or may be inferred from the terms of the security; and where according to this the ship, though in the possession of the mortgagees, was not to be sold till two months after demand in writing of the debt, it was considered (*n*) that a right to use the ship during that interval was implied, and not an intention that she should remain useless; and that such a right was contemplated by the provision of the Shipping Act above mentioned, as a means by

(*m*) 17 & 18 Vict. c. 104, s. 70.

(*n*) *European, &c. Co. v. Royal Mail, &c. Co.*, 4 K. & J. 676.

which the ship might be made available for the payment of the mortgage debt; and was also incident to the character of a mortgagee as distinguished from that of a mere bailee. The judges of the Court of Appeal, however, taking a lower view of the mortgagee's rights, appear in effect to have agreed, that, though the first duty of the mortgagee of a ship who takes possession is to sell, he is not bound to do so at every sacrifice; and if he cannot reasonably or prudently do so, he will be justified, in the exercise of the sound discretion of a prudent owner, in employing the ship (*o*). But the unlimited right to send her to any distance, and to employ her for any indefinite time at the mortgagor's cost for repairs, wages, insurance and other disbursements and risks, and at the risk of involving him in speculative adventures, was strongly denied (*p*).

Where mortgagees in possession employed the ship in a trade which they had notice was unremunerative, and in so doing injured her, and afterwards made an improvident sale, they were charged with her value at the time of taking possession; although in the opinion of Turner, L. J., they should properly have been charged with what she might have earned if chartered in the ordinary course, according to the usual mode of charging mortgagees in possession, and with all damages beyond ordinary wear and tear occasioned by the use made of her (*q*).

A mortgagee may properly refuse to enter into a charter-party for the employment of the ship in a voyage of a speculative character (*r*).

757. The mortgagor, on the other hand, while the mortgagee allows him to retain possession, has full liberty to deal with the ship, so far as he can do so consistently with the sufficiency of the security; and the mortgagee, so long as he does not interfere, will be held to have acquiesced in all proper

(*o*) *Marriott v. Anchor Reversionary Co.*, 3 De G., F. & J. 177; *De Mattos v. Gibson*, 1 J. and H. 85, per Wood, V.-C.

(*p*) *Id.*

(*q*) *Id.* As to damages for loss of

profit where a mortgagee is restrained from using the ship, see *De Mattos v. Gibson*, 1 J. & H. 79.

(*r*) *Samuel v. Jones*, 7 L. T., N. S. 760.

engagements for her use which have been made by the mortgagor; who may enter into such contracts for her use as are proper to give the mortgagor the full benefit of the ownership, and by means of which he may earn the means of discharging the mortgage debt(s): and the mortgagee cannot maintain in the Admiralty an action of restraint against, and will be restrained in equity from interfering with, such a contract. And as well for this purpose, as that she may be a source of profit to the mortgagee himself when he takes possession, the mortgagor may do all that is proper to keep the ship in an effective condition; and for such repairs as are made by his direction when in possession, the shipwright may enforce his possessory lien against the mortgagee(t) (293).

If, however, the mortgagee can show that the acts of the mortgagor will injure his security, the statutory provision that the mortgagor shall retain the character of owner (which in fact is said (u) to have been for the benefit of the mortgagee) will cease to operate (x). And the mortgagee may require payment to himself, of the fruit of any contract for the use of the ship which has been made by the mortgagor; for the right to receive the earnings of the ship, whether freight or passage money, passes to the mortgagee by the transfer, as incident to the ship (y) (1056).

But the mortgagee must take possession, or assert his right by some other means, as by requiring payment from the charterer before the mortgagor has received the produce, or has done an act tantamount to taking possession; otherwise, like the produce of a mortgaged estate, it cannot be recovered from the mortgagor (1491) (z). And, even in the hands of

(s) *Collins v. Lamport*, 11 Jur., N. S. 1; *The Innisfallen*, L. R., 1 Adm. 72; *Johnson v. Royal Mail, &c. Co.*, L. R., 3 C. P. 38.

(t) *Williams v. Allsup*, 10 C. B., N. S. 417; 8 Jur., N. S. 57. See *The Skipwith*, 10 Jur., N. S. 445.

(u) *Per Best*, C. J., *Dean v. M'Ghie*, 4 Bing. 49; 12 Moo. 197.

(x) *Collins v. Lamport*, *supra*.

(y) *Morrison v. Parsons*, 2 Taunt. 407; *Dean v. M'Ghie*, 12 Moore, 185;

4 Bing. 45; *Kerswill v. Bishop*, 2 Cr. & J. 529; *Gardner v. Cazenove*, 1 H. & N. 423; *Willis v. Palmer*, 7 C. B., N. S. 340, 6 Jur., N. S. 732; *Wilson v. Wilson*, L. R., 14 Eq. 32. But there can be no claim for freight where the goods are shipped on account of the owners. *Gumm v. Tyrie*, 4 B. & S. 680, per *Cockburn*, C. J.

(z) *Rusden v. Pope*, L. R., 8 Exch. 269; *Wilson v. Wilson*, *supra*.

the mortgagee, the produce is liable for the expenses of the voyage in which it was earned (*a*). The mortgagee, whether in possession or not, is not liable for necessaries supplied to the ship, unless they were ordered by his agent or upon his credit (*b*). And if he have paid expenses for which the ship was liable in order to obtain possession of her, he may recover them from the person by whose neglect to pay them the ship became liable (*c*).

758. The pledge of a policy of insurance upon a ship passes no interest in the ship, and therefore does not entitle the pledgee to give notice to the underwriters of abandonment (*d*).

(*a*) *Green v. Biggs*, 6 Hare, 395; *another character with reference to the ship, gives directions for repairs, the question in what character he acted is for the jury. (*Castle v. Duke*, 5 Car. & P. 359.)
Cato v. Irving, 5 De G. & S. 210;
Alexander v. Simms, 18 Beav. 80; 5
 De G., M. & G. 57.

(*b*) *The Troubadour*, L. R., 1 Adm.
 302; *Twentyman v. Hart*, 1 Stark. 366;
Briggs v. Wilkinson, 7 B. & C. 30;
Myers v. Willis, 17 C. B. 77; 18 id.
 886. If the mortgagee, also filling

(*c*) *Johnson v. Royal Mail S. P. Co.*,
 L. R., 3 C. P. 38.

(*d*) *Jardine v. Leathley*, 9 Jur., N. S.
 1035; 3 B. & S. 700.

CHAPTER V. PART 5.—OF EXECUTION UNDER JUDGMENTS.

759. A judgment for the recovery by or payment to any person of money, may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the Supreme Court of Judicature Acts, might have been enforced at the time of the passing thereof.

A judgment for the payment of money into court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment.

A judgment for the recovery of or for the delivery of the possession of land, may be enforced by writ of possession.

A judgment for the recovery of any property other than land or money, may be enforced—

By writ for delivery of the property.

By writ of attachment.

By writ of sequestration.

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal (*e*).

760. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the court or a judge for leave to issue execution against such party. And the court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly; or may direct that any issue or question necessary for the determination of the rights of the parties, be tried in any of the ways in which questions arising in an action may be tried (*f*).

761. Every person to whom any sum of money or any costs

(*e*) Supreme Court of Judicature (*f*) *Id.*, r. 7.
Act, 1875, Ord. XLII, rr. 1, 2, 8, 4, 5.

shall be payable under a judgment shall immediately after the time when the judgment was duly entered be entitled to sue out one or more writ or writs of *feri facias* or of *elegit* to enforce payment thereof; but if the judgment is for payment within a period therein mentioned, not until after the expiration of such period: and the court or judge at the time of giving judgment, or the court or a judge afterwards, may give leave to issue execution before, or may stay execution until any time after, the expiration of the period before prescribed (*g*).

762. A writ of execution if unexecuted, shall remain in force for one year only from its issue unless renewed; but such writ may at any time before its expiration, by leave of the court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the court; and a writ of execution so renewed shall have effect and be entitled to priority, according to the time of the original delivery thereof (*h*).

The production of a writ of execution or of the notice renewing the same, purporting to be marked with such seal showing the same to have been renewed, shall be sufficient evidence of its having been so renewed (*i*).

763. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment (*k*).

Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court or a judge

(*g*) Supreme Court of Judicature
Act, 1875, Ord. XLII. r. 15.

(*h*) Id., r. 16.

(*i*) Id., r. 17.

(*k*) Id., r. 18.

for leave to issue execution accordingly. And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such court or judge may impose such terms as to costs or otherwise as shall seem just (*l*).

764. Every order of the court or a judge, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect (*m*).

765. In cases other than those mentioned in Rule 18, any person not being a party in an action, who obtains any order, or in whose favour any order is made, may enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order, as if he were party to the action (*n*).

766. The statute 1 & 2 Vict. c. 110, enacted (*o*) as to the operation of judgments against real estates, that the sheriff or other officer to whom any writ of elegit or precept in pursuance thereof should be directed at the suit of any person, upon any judgment then or thereafter to be recovered in any action in a superior court, might make and deliver execution to the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including copyholds or customary lands and hereditaments, as the person against whom execution was so sued, or any person in trust for him, should have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person should, at the time of entering up such judgment, or at

(*l*) Supreme Court of Judicature
Act, 1875, Ord. XLII. r. 19.
(*m*) Id., r. 20.

(*n*) Id., r. 21.
(*o*) Sect. 11; Irish Act, 3 & 4 Vict. c.
105, s. 19.

any time afterwards, have any disposing power (*p*), which he might, without the assent of any other person, exercise for his own benefit, as execution might theretofore be delivered of one moiety of the lands and tenements of any person against whom a writ of elegit was sued out: the hereditaments so delivered to be held and enjoyed, subject to such account in the court, out of which such execution was sued, as tenant by elegit was theretofore subject to in a court of equity; but as to copyhold and customary lands, subject to the due payments and services to the lord of the manor, until satisfaction of which payments and of the value of the services, as well as for the judgment debt, the lands might be held; and provided that, as against purchasers, mortgagees and creditors becoming such before the commencement of the act, the elegit should have no greater effect than an elegit would have had if the act had not passed.

767. The whole estate of the judgment debtor being now charged, it is no longer necessary to describe the lands by metes and bounds, by which means alone the sheriff could ascertain the moiety of which it was formerly his duty to give possession. Such a description may now be used as would be sufficient to identify the lands (*q*).

Proof of possession or receipt of rent by the judgment debtor is evidence upon which the jury is bound to find that he has lands (*r*).

The judgment creditor cannot dispute the writ on the ground that his own title is bad, the return to the inquisition being conclusive as between him and the elegit creditor, although, where several are in possession, it is allowable to show in whom the legal title is (*s*).

768. The act also gave (*t*) the judgment creditor the same

(*p*) Under the old law, a judgment might be defeated by the execution of an earlier power. (See *Doe d. Wigan v. Jones*, 10 B. & C. 459; *Tunstall v. Trappes*, 3 Sim. 300.)

(*q*) *Doe d. Roberts v. Parry*, 13 M. & W. 356; *Sherwood v. Clark*, 15 M.

& W. 764.

(*r*) *Barnes v. Harding*, 1 C. B., N. S. 568.

(*s*) *Martin v. Smith*, 27 L. J., N. S., Ex. 317.

(*t*) Sect. 13. In Ireland (3 & 4 Vict. c. 105, s. 22.) But see 13 & 14 Vict.

remedies in equity against the hereditaments charged, as he would have had in case the judgment debtor had power to charge, and had by writing agreed to charge, the same with the amount of the judgment debt and interest thereon.

A judgment formerly, when duly registered (181) under this act, but now under 27 & 28 Vict. c. 112, only after execution registered and the sheriff's return (*u*), becomes a direct charge upon the debtor's interest in land, whether that interest be legal or equitable. It, therefore, binds (*v*) the equitable interest acquired before conveyance, by a purchaser who has accepted the title, even to the extent of interference with the rights of the vendor coming to enforce his lien for unpaid purchase-money; and also (*x*) the interest of a judgment debtor as against purchasers under a decree for sale, in a suit by the creditors of his ancestor; though the judgment were entered up after the commencement of the suit. A covenant to pay a sum of money, to be charged upon all a person's estates, is an estate or interest within the act (*y*); as is also a mortgage debt, so far as the principal or interest are paid out of the rents and profits, or the proceeds of sale: but not interest paid under a covenant (*z*).

Nor is an interest in a share of the proceeds of sale of real estate, devised upon an absolute trust for sale, an estate or interest which will entitle a judgment creditor to a charge upon the land (*a*).

769. Though an equitable interest in a term of years cannot be taken in execution at law (*b*), yet a judgment creditor is entitled, after suing out execution, to an equitable remedy, either directly, or by the indirect process of compelling the trustee to convey the legal interest to the debtor, so as to

c. 29, ss. 1, 2; and sect. 11 providing that sect. 22 of the 3 & 4 Vict. shall not extend to interests created by securities.

(*u*) *Guest v. Cowbridge Railway Co.*, L. R., 6 Eq. 619.

(*v*) 1 & 2 Vict. c. 110, s. 13; *Greycoat Hospital v. Westminster Improvement Commissioners*, 1 De G. & J.

531; 3 Jur., N. S. 1188.

(*x*) *Craddock v. Piper*, 14 Sim. 310.

(*y*) *Russell v. McCulloch*, 1 K. & J.

313; 1 Jur., N. S. 157.

(*z*) *Avison v. Holmes*, 1 J. & H. 580; 7 Jur., N. S. 722.

(*a*) *Thomas v. Cross*, 2 D. & S. 423; 11 Jur., N. S. 384.

(*b*) *Scott v. Scholey*, 8 East, 467.

make it subject to legal execution. An execution creditor, under an unregistered judgment, has therefore been held (*c*) entitled in equity to a lien upon an equitable interest in a term which had come to the hands of creditors.

770. The rights of judgment creditors, independently of the statute, are purely legal, and equity only interposes to assist and remove impediments from the legal right, or to protect the property pending disputes at law concerning the title; but does not supply or extend the legal right. Except, therefore, under the statute, the creditor cannot have the aid of equity against the debtor's real or personal estate, without execution (*d*); and a demurrer will lie, unless it be alleged that execution has been sued out (*e*). The objection of the want of an execution cannot be met by putting the case upon the jurisdiction of the court to relieve against fraud (*f*).

Tenant by elegit may distrain without attornment (*g*).

771. The judgments of county courts will be aided (*h*) in equity against the equitable chattel interests of the debtor, and will be made liable as if they were legal interests. And in the case of county courts, it being expressly directed that the writ shall bind when placed in the hands of the bailiff, it is not necessary first to issue an elegit.

772. The word "rents" includes annuities (*i*) directed to be raised out of lands. Leaseholds are also bound (*h*); but to make the judgment effectual against them, an elegit must first have been sued out; for under the old law a docketed judgment did not bind leaseholds until elegit (*l*), and a registered

(*c*) *Gore v. Bowser*, 3 Sm. & G. 1; 1 Jur., N. S. 392.

(*d*) *Neate v. Duke of Marlborough*, 3 M. & C. 407; *Smith v. Hurst*, 1 Col. 705; *S. C.*, 10 Hare, 30; and see *Higgins v. York Building Co.*, 2 Atk. 107; *Godfrey v. Tucker*, 33 Beav. 380; *Guest v. Cowbridge Railway Co.*, L. R., 6 Eq. 619.

(*e*) *Mitt. Pl.* 126, ed. 4; 149, ed. 5.

(*f*) *Smith v. Hurst*, 10 Hare, 30.

(*g*) *Lloyd v. Davies*, 2 Exch. 103.

(*h*) *Bennett v. Powell*, 3 Dr. 326.

(*i*) *Youngehusband v. Gisborne*, 1 De G. & S. 209.

(*h*) *Harris v. Davison*, 15 Sim. 128; *Sugd. V. & P.* 667, ed. 11; 536, ed. 14.

(*l*) See *Burdon v. Kennedy*, 3 Atk. 739; *Westbrooks v. Blythe*, 3 El. & Bl. 787; 2 C. L. R. 1660.

judgment does not bind any land further or more extensively than a docketed judgment would have done (*m*).

773. The words "rectories" and "tithes," though literally applicable to ecclesiastical benefices, do not under this statute apply to them. The charging of ecclesiastical benefices in England was prohibited by 13 Eliz. c. 20; which statute having been repealed by 43 Geo. 3, c. 84, was revived on the repeal of that act by 57 Geo. 3, c. 99, and still remains in force (*n*). All direct charges on such benefices are therefore void (**376**); and a judgment creditor of a beneficed clergyman can only make the profits of the benefice applicable to the discharge of his debt by means of a sequestration, issued by the bishop under a writ directed to him, sued out by the judgment creditor (*o*), and which operates from the time of publication (*p*), by reading it in the church during divine service, and afterwards at the church door, and under which the creditor becomes entitled to receive, through the sequestrators, the future profits of the benefice, after providing for the duties of the church, until the debt and costs of the sequestration are satisfied (**774**).

When, therefore, the warrant of attorney, or other instrument upon which the judgment is entered up, points expressly (*q*) or by inevitable consequence (*r*) to a charge upon the benefice, it will be void; though not where the application of the profits is only a possible consequence of the transaction; for in the one

(*m*) 2 & 3 Vict. c. 11, s. 5.

(*n*) *Hawkins v. Gathercole*, 1 Jur., N. S. 481.

(*o*) Commissions of sequestration of ecclesiastical benefices and their profits have also been directed by the Court of Chancery to the bishop, in order to enforce orders of that court for the payment of money; though having regard to the statute of Elizabeth, the validity of the proceeding appears latterly to have been doubted. (*Norton v. Pritchard*, cited from Reg. Lib. 2 Sm. & G. 455; and *Allen v. Williams*, reported there.) In Ireland (in the Exchequer) a receiver was refused where there was no sequestrator and the bishop was not

a party, on the ground that the court or a receiver could not settle the allowances or otherwise provide for the cure of the benefice. (*McCurdy v. Chichester*, 2 Jo. 358.)

(*p*) *Doe d. Morgan v. Bluck*, 3 Camp. 447; *Waite v. Bishop*, 1 C. M. & R. 507; 5 Tyr. & Gr. 90; but see per Bayley, J., *Barnett v. Apperley*, 6 B. & C. 630.

(*q*) *Newland v. Watkin*, 9 Bing. 113; 1 L. J. (N. S.) C. P. 177; *Flight v. Salter*, 1 Barn. & Ad. 673; *Shaw v. Pritchard*, 10 B. & C. 241; *Saltmarsh v. Hewett*, 1 A. & E. 812.

(*r*) *Alchin v. Hopkins*, 1 Bing. N. C. 99; *Long v. Storie*, 3 De G. & S. 308.

case the security would absorb all the profits of the benefice, while in the other the warrant of attorney produces a sequestration, which of necessity provides for the serving of the cure (*s*). A warrant to enter up judgment as a collateral security for a debt charged upon a benefice is therefore not void (*t*) merely because the bond, upon which it authorizes judgment to be given, purports to be a security for an annuity, charged by a deed of even date upon the benefice; the terms of the charging deed not being by the mere reference incorporated in the warrant of attorney.

774. The Sequestration Act, 1871, provides for the appointment of curates by the bishop where, under a judgment recovered against the incumbent of a benefice, or under his bankruptcy, a sequestration issues and remains in force for six months, and for the stipends to be paid to such curates. The bishop may also inhibit the incumbent, pending the sequestration, from performing the services of the church within the diocese; and the patronage of any benefice annexed to the sequestrated benefice vests in the bishop during the sequestration (*u*).

775. The trustee in the bankruptcy of a beneficed clergyman may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of a trustee is a sufficient authority for granting the sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt.

The sequestrator is to allow to the bankrupt out of the profits of the benefice, while he performs the duties of the parish or place, such an annual sum payable quarterly as the bishop of the diocese shall direct. And the bishop may appoint to the bank-

(*s*) *Aberdeen v. Newland*, 4 Sim. 261; *Moore v. Ramsden*, 7 Ad. & El. 898.

(*t*) *Britten v. Wait*, 3 Barn. & Ad. 915; *Colebrook v. Layton*, 4 id. 578. See *Faircloth v. Gurney*, 9 Bing. 622.

(*u*) 34 & 35 Vict. c. 45. The word "benefice" includes all rectories with cure of souls, vicarages, new vicarages,

perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries with or without districts annexed or belonging to them (*s*. 1, and Incumbents Resignation Act, 1871, c. 44, s. 2). And as to repairs pending the sequestration, see Ecclesiastical Dilapidations Act, 1871, c. 43, ss. 12--18, 20, 21.

rupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice, if the bankrupt had been non-resident (*y*) (1108).

776. As to purchasers, mortgagees or creditors who should have become such before the commencement of the act, no lands, tenements or hereditaments were to be affected by the judgment otherwise than as before the commencement of the act (*z*); and the equitable doctrine whereby protection is given to purchasers for valuable consideration without notice was declared to remain unaffected by the act. By another act (*a*), the lands were declared not to be bound, as against purchasers and mortgagees without notice, by any judgment, though duly registered, further than they would have been before the act of 1 & 2 Vict. c. 110, by a judgment of a superior court of law duly docketed, according to the then existing law (*b*).

777. As to the operation of judgments against the personal estate of the debtor, the statute 1 & 2 Vict. c. 110, enacts (*c*), that the sheriff or other officer having the execution of any writ of fieri facias to be sued out of any superior or inferior court after the time appointed for the commencement of the act, or any precept in pursuance thereof, is authorized to seize and take any money, Bank of England or other bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money (which last expression includes policies of assurance (*d*)), belonging to the person against whose effects such writ shall be sued out, and to pay and deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and is directed to hold any such cheques, or other instruments or securities, as security for so much of the money directed to

(*y*) Bankruptcy Act, 1869, c. 71,
s. 88.

(*z*) 1 & 2 Vict. c. 110, s. 13.

(*a*) 2 & 3 Vict. c. 11, s. 5; and see
18 & 19 Vict. c. 15, s. 3.

(*b*) See *Doswell v. Reece*, 11 Jur.,
N. S. 764.

(*c*) Sect. 12.

(*d*) *Law v. London Indisputable Life*
Policy Co., 1 K. & J. 223; *Robson v.*
M'Creight, 25 Beav. 272; *Stokoe v.*
Cowan, 29 Beav. 637; 7 Jur., N. S.
901.

be levied as shall not have been otherwise levied and raised. And may sue in his own name for the recovery of the money secured thereby, if and when the time for payment thereof shall have arrived. And the person liable on any such security is discharged from his liability to the extent of any payment to the sheriff or other officer, or of such recovery and levy in execution. The money so to be recovered, or sufficient thereof to discharge the amount directed to be levied, is to be paid to the person suing out the writ, and any surplus, after satisfaction thereof, with sheriff's poundage and expenses, is to be paid to the debtor. But the sheriff or other officer is not bound to sue upon any such cheque or other security, unless the execution creditor shall enter into a bond with two sufficient sureties, for indemnifying him against all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof; the expense of such bond to be deducted out of any money to be recovered in such action (*e*).

778. The property in the goods taken by the sheriff is not by the seizure either vested in the creditor, or divested from the debtor, though the sheriff has in them a special property by virtue of which he may maintain an action. At any time before sale, the debtor by payment of the demand may resume possession, for which the withdrawal of the sheriff only, and no act of re-transfer, is necessary. A result of this suspension of the creditor's rights is, that, after seizure and before sale, the crown under an extent may assert its priority and seize the property (*f*). In the case of chattels real, the property remains in the debtor until the execution of an actual assignment by the sheriff to the purchaser; and the debtor may recover them at law from the execution creditor himself, if he have purchased without an actual written assignment (*g*).

(*e*) See the powers given in almost similar terms by the County Court Act (9 & 10 Vict. c. 95, ss. 96, 97), for the bailiff to seize, and the high bailiff to hold, personal property of the above mentioned kinds; but the power to sue on the securities seized is given to the plaintiff to be exercised in the name

of the defendant, or of any person in whose name the defendant might have sued.

(*f*) *Giles v. Grover*, 9 Bing. 128; 6 Bligh, N. S. 277; and see *Williams, Exp.*, 7 Ch. 317.

(*g*) *Doe d. Hughes v. Jones*, 9 M. & W. 372; *Playfair v. Musgrove*, 14 id. 289.

The sheriff can only seize goods which are in the possession of the debtor. He cannot take such as are held by the debtor's trustee (*h*), nor can he seize under this act purchase-money which remains unpaid (*i*).

779. As a general rule, the sheriff can seize only that which can be sold. And this rule remains unaffected by the statute (*k*), except of course as to money, the seizure of which it expressly authorizes. A lien upon goods therefore, being personal only, and continuing no longer than the possession of the holder, is incapable of sale or seizure (*l*).

If the holder of goods have only a limited interest therein, as in the case of goods held on hire for a term, that limited interest may be seized and sold. And if the absolute owner have, as he is bound to do, given notice to the sheriff of the limited interest of the debtor, and the sheriff after notice sell the absolute property, he is liable (*m*) to be sued by the owner. If the debtor be only a trustee of the goods, he may dispute (*n*) the seizure in that character, and the sheriff may interplead. But the sheriff is not bound by an estoppel which would have bound the judgment creditor, and may seize goods as his, to which he, by his conduct, has precluded himself from laying claim (*o*).

780. A balance of money in the hands of a late sheriff, arising from a sale under an execution, after payment of the creditors, cannot be taken in execution by the sheriff's successor (*p*), because it is a mere debt from the former sheriff to the debtor; nor can it be taken by the sheriff who made the original seizure, unless (*q*) he had earmarked it by setting it aside as a specific fund, to answer the balance payable under the first execution. Nor can bank notes, or money seized, be

(*h*) *France v. Campbell*, 6 Jur. 105;
Robinson v. Peace, 7 Dowl. P. C. 93.

(*i*) *Brown v. Perrott*, 4 Beav. 585.

(*k*) *Dean v. Whittaker*, 1 Car. & P.
347.

(*l*) *Legg v. Evans*, 6 M. & W. 36;
8 Dowl. P. C. 177.

(*m*) *Dean v. Whittaker*, *supra*; *Duffill v. Spottiswoode*, 3 Car. & P. 485.

(*n*) *Fenwick v. Laycock*, 2 Q. B. 108.

(*o*) *Richards v. Johnsten*, 4 H. & N.
660.

(*p*) *Harrison v. Paynter*, 6 M. & W.
387.

(*q*) *Wood v. Wood*, 4 Q. B. 397.

made available in the sheriff's hands to satisfy an execution against an execution creditor (*r*); because, like goods of any other description, they do not by the mere seizure become the property of the execution creditor (778). If a writ be delivered for the purpose of execution, but be used only for the protection of the debtor's goods against the creditors, and the goods are taken under a second writ, the sheriff may return *nulla bona* to the first (*s*).

781. If the sheriff have knowledge that rent is due (express notice not being necessary), he cannot be called upon to sell or remove the goods until the rent be paid; by doing which he would become liable, under the statute 8 Anne, c. 14, s. 1, to an action by the landlord. The duty of providing for the payment of rent does not fall on the sheriff, but on the execution creditor (*t*).

782. No writ of *fi. fa.* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for valuable consideration, before the actual seizure or attachment thereof by virtue of such writ.

Provided that such person had not, when he acquired his title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, undersheriff or coroner (*u*).

Of the Attachment of Debts.

783. By the Common Law Procedure Act, 1854, any creditor, who has obtained a judgment in any of the superior courts, may apply to the court or a judge of any of the superior courts at Westminster; and by the Judicature Act, 1873,

(*r*) *Collingridge v. Paxton*, 11 C. B. 683.

(*s*) *Doker v. Hasler*, 2 Bing. 479; 3 L. J., C. P. 109.

(*t*) *Cocker v. Musgrove*, 9 Q. B. 223; *Riseley v. Ryle*, 11 M. & W. 16.

(*u*) *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97, s. 1).

where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the court or a judge, for the oral examination of the judgment debtor, as to what, if any, debts are owing to him, before an officer of the court, or such other person as the court or a judge shall appoint; and the court or judge may make an order for the examination of the debtor, and the production of books or documents (*x*). Under the Common Law Procedure Act, 1860, the court or judge may refuse to interfere, where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious (*y*).

The court or a judge may, upon the *ex parte* application of the judgment creditor, either before or after such examination, and upon affidavit by himself or his solicitor, stating that judgment has been recovered and is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such person (who is called the garnishee (*z*)) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or an officer of the court, as such court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or

(*x*) 17 & 18 Vict. c. 125, ss. 60, 99; Judicature Act, 1875, Ord. XLV. (1). The order of a court of equity, or the rule of a superior court of law, for the payment of money or costs, did not, by force either of 1 & 2 Will. 4, c. 58, s. 7, or of 1 & 2 Vict. c. 110, s. 18, give any right to an attachment; because such an order does not rank as a judgment, but has only the effect of a judgment for the purpose of the particular remedies given by the judgment act: and also, in the former case, because the order of a court of equity was not enforceable by a court of law. Frankland, Re, L. R., 8 Q. B. 18; Best

v. Pembroke, id. 363; notwithstanding Hartley v. Shemwell, 1 B. & S. 1; Financial Corporation and Price, Re, L. R., 4 C. P. 155; see Holcroft v. Manby, 8 Sc., N. R. 473. Nor could a judgment creditor, by analogy to the remedy by attachment, obtain a charge in equity in respect of an equitable debt (Horsley v. Cox, L. R., 4 Ch. 92).

(*y*) 23 & 24 Vict. c. 126, s. 28.

(*z*) If the order be made against executors, in respect of a debt due from their testator, it should appear on the face of it that it is so made (Stevens v. Phelps, L. R., 10 Ch. 423, per Mellish, L. J.).

so much thereof as may be sufficient to satisfy the judgment debt (*a*).

If in such a case it be suggested by the garnishee, that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it (*b*), the court or judge may order such third person to appear and state the nature and particulars of his claim upon such debt.

After hearing the allegations of such third person and of any other person whom by the same or any subsequent order the court or judge may order to appear, or in case of such third person not appearing when ordered, the court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to rule 5, and may bar the claim of such third person or make such other order as the court or judge shall think fit, upon such terms in all cases with respect to the lien or charge (if any) of such third person and to costs as the court or judge shall think just and reasonable (*c*).

784. It is necessary for the application of the acts that there should be an existing debt, notwithstanding the use of the word *accruing*; which is applied to a debt due but payable at a future time. There can therefore be no rule to attach unliquidated damages where judgment has not been signed, or other unascertained sum (*d*). It must also be a recoverable debt (*e*), and must be due to the judgment debtor; for the garnishee will not be bound by the act if he be liable to pay it to the debtor's assignee (*f*). And if there be a joint judgment against several debtors, a debt due to any one of them may be attached, because all are bound by the judgment (*g*).

(*a*) C. L. P. Act, 1854, s. 61; Judicature Act, 1875, Ord. XLV. (2); Irish Act, 19 & 20 Vict. c. 102, s. 63, 1856*

(*b*) C. L. P. Act, 1860, s. 29; Jud. Act, 1875, Ord. XLV. (6).

(*c*) C. L. P. Act, 1860, s. 30; Jud. Act, 1875, Ord. XLV. (7).

(*d*) Jones v. Thompson, 1 El., Bl. &

El. 63; Johnson v. Diamond, 11 Exch. 78; Dresser v. Johns, 6 C. B., N. S. 429.

(*e*) Innes v. East India Co., 17 C. B. 351.

(*f*) Hirsch v. Coates, 18 C. B. 757.

(*g*) Miller v. Mynn, 28 L. J., N. S. Ex. 324; 1 E. & E. 1075.

Rent may be attached under the act (*h*), although it is otherwise under the practice of foreign attachment in the Lord Mayor's Court (*i*). No order for the attachment of the wages of any servant, labourer or workman, can be made by the judge of any court of record or inferior court (*h*); nor for an attachment of the surplus of a bankrupt's estate against the official assignee of the Court of Bankruptcy (*l*).

The power of attachment being discretionary, a debt will not be attached of which the judgment debtor cannot enforce immediate payment; as where an action is *bonâ fide* pending against the garnishee in respect of the debt, and no collusion between him and the garnishee is shown (*m*); or where the effect of an order would be to give a preference, in respect of a debt agreed to be paid without priority as between the judgment debtor and other creditors (*n*).

The rule of equity, by which a creditor, who has obtained a judgment against the legal personal representative of his debtor, before a decree for the administration of his estate is entitled to enforce his judgment, enables him to recover his debt under this act from a debtor to the estate which is in course of administration (*o*). And the judgment creditor in such a case may obtain an order from a court of law to attach the debt, although a decree has been made for administration (*p*).

The claim of the creditor to proceed under the act was not defeated, where the garnishee had been taken in execution for his debt; because the debt of the creditor who resorted to that remedy was not thereby extinguished, but only suspended (*q*). But it was different where the judgment debtor him-

(*h*) *Mitchell v. Lee*, L. R., 2 Q. B. 259; 8 B. & S. 92.

(*i*) Com. Dig. Attachment D.; and see the various other kinds of property there mentioned as not subject to the custom of foreign attachment.

(*k*) 33 & 34 Vict. c. 30 (The Wages Attachment Abolition Act).

(*l*) *Hunter and others, Re*, L. R., 8 C. P. 24; notwithstanding *Warwick, &c. Railway Co., Re*; *Turner, Exp.*,

2 De G., F. & J. 354.

(*m*) *Richardson v. Greaves*, 10 W. R. 45.

(*n*) *Kennett v. Westminster Improvement Commissioners*, 11 Exch. 349.

(*o*) *Fowler v. Roberts*, 2 Gif. 226.

(*p*) *Burton v. Roberts*, 6 H. & N. 93; 29 L. J., N. S., Ex. 484.

(*q*) *Marple v. Hartley, Hartley v. Shemwell*, 7 Jur., N. S. 774; 1 B. & S. 1. See now the Debtors Act, 1869.

self had been taken in execution by the creditor who desired to proceed under the act; for he could not afterwards issue execution against his debtor's estate (1359); and the act only places debts due to the judgment debtor in the same position as his other property, which, independently of it, could be taken in execution (*r*).

The executor of a judgment creditor cannot attach a debt due to the judgment debtor, until he has made himself a party to the judgment (*s*).

785. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the court or judge shall direct, shall bind such debts in his hands (*t*). Under this clause not only may an accruing debt be attached, but an order may be made for payment of it by the garnishee when it becomes due (*u*). It does not bind personal estate of the testator of the garnishees, when they, after service of the order *nisi*, have paid it into the Court of Chancery under an order in an administration suit (*x*).

786. If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt (*y*).

(*r*) *Jauralde v. Parker*, 6 H. & N. 431.

(*s*) *Baynard v. Simmons*, 5 E. & B. 59.

(*t*) C. L. P. Act, 1854, s. 62; Irish Act, s. 64; Judicature Act, 1875, Ord. XLV. (3).

(*u*) *Tapp v. Jones*, L. R., 10 Q. B. 591.

(*x*) *Stevens v. Phelps*, L. R., 10 Ch. 417.

(*y*) C. L. P. Act, 1854, s. 63; Irish Act, s. 65; Judicature Act, 1875, Ord. XLV. (4).

787. If the garnishee dispute his liability, the court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined (*z*). Under the Act of 1854 the judgment creditor might proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; it was held that such writ would not issue on the mere assertion of the garnishee that he disputed the debt, but that he must show just ground for making the order (*a*). •

If the judgment creditor does not proceed by writ under this section, when the garnishee disputes his liability, the latter is entitled to have the attachment dismissed with costs (*b*).

There is no provision for the adjustment of cross claims between the garnishee and the judgment creditor, and the amount of a debt due from the latter cannot be retained by the garnishee (*c*).

788. Payment made by or execution levied upon the garnishee, under any such proceeding as aforesaid, will be a valid discharge to him, as against the judgment debtor, for the amount paid or levied, though the proceeding may be set aside, or the judgment reversed (*d*); and so will payment into court under a judge's order, whether it be made on account of the debt or in fulfilment of terms upon which the order was made (*e*). It will generally also be good against a person claiming a lien on

(*z*) Judicature Act, 1875, Ord. XLV. (5); C. L. P. Act, 1854, s. 64; Irish Act, s. 66. See *Homer v. Luff*, 3 B. & S. 818.

(*a*) *Newman v. Rook*, 4 C. B., N. S. 434.

(*b*) *Wintle v. Williams*, 3 H. & N. 288.

(*c*) *Sampson v. Seaton Railway Co.*, L. R., 10 Q. B. 28; see *Tapp v. Jones*, id. 591.

(*d*) C. L. P. Act, 1854, s. 65; Irish Act, s. 67; Judicature Act, 1875, Ord. XLV. (8).

(*e*) *Culverhouse v. Wickens*, L. R., 3 C. P. 295.

the fund who does not come in after notice to support his claim (*f*). But notwithstanding such notice and the non-appearance of the person served, the Court of Admiralty has ordered payment out of a fund in court of the proctor's costs (*g*), and refused to allow the right to a fund so situated to be affected by service upon the registrar of an order of attachment out of the Lord Mayor's Court (*h*).

It has been held that after the registration of a deed of arrangement between the debtor and his creditors under the Bankruptcy Act, 1861 (which placed the debtor and the trustees of the deed in the position of a bankrupt and his assignees), payment of the debt upon service of the order absolute would be good against the trustees, as a payment under the order of a court of competent authority, if, being made before notice of the trust deed, the garnishee had no cause to show against the order; and also if being made after notice, the order could not be set aside before payment became necessary to avoid an actual execution (*i*). It is presumed that the decision would apply to a payment made after, but without notice of, a registered resolution for liquidation by arrangement under the Bankruptcy Act, 1869. It seems that if the garnishee have notice of a bankruptcy or trust deed in sufficient time, he ought to show cause under the first order; and that it would not be safe for him to pay without an immediate threat of execution, and without taking any step to get the order set aside, or giving notice to the assignee to do so. The payment will be no discharge to persons who have a lien upon the fund, if no notice of the application for the order were made to them, nor any mention of the lien made to the judge who made the order (*k*).

789. There shall be kept by the proper officer a debt attachment book, in which entries shall be made of the attachment and proceedings thereon, with names, dates and statements of the amount recovered and otherwise; and copies of any entries

(*f*) Olive, Swab. Ad. 423.

(*g*) Jeff Davis, L. R., 2 Ad. 1.

(*h*) Albert Crosby, Lush. 101.

(*i*) Wood v. Dunn, L. R., 2 Q. B. 74,

reversing *id.*, L. R., 1 Q. B. 77; 7 B. & S. 94; 36 L. J., Q. B. 27; 35 *id.* 11.

(*k*) Leader, L. R., 2 Ad. 314.

made therein may be taken by any person upon application to the proper officer (*l*).

790. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application shall be in the discretion of the court or a judge (*m*).

791. Under the remedy against garnishees, by the custom of the city of London, which corresponds to that given by the Common Law Procedure Act (*n*), but does not require that a judgment should have been previously obtained against the debtor whose debt is attached in the hands of the garnishee, it has been held that if the debtor does not raise in the action in the Lord Mayor's Court an objection of which he might take advantage there, he cannot use it in a subsequent action against the garnishee to recover the debt which the latter was compelled to pay under the process of attachment (*o*). But if the proceedings in the Lord Mayor's Court were commenced and carried on against a person who was then dead, as the custom does not warrant such a proceeding, and as there was no person before the court who could plead, the garnishee cannot set up the payment made under the attachment, against the personal representatives of the debtor, even though administration was taken out before execution, and the administrator might have appeared in the Lord Mayor's Court and have discharged the attachment (*p*). The garnishee will not be discharged of money paid under the attachment unless it were paid on execution executed (*q*).

This custom of foreign attachment in London does not apply to debts, the beneficial interest in which is vested in a person other than the defendant sued in the Lord Mayor's

(*l*) Judicature Act, 1875, Ord. XLV. (9); C. L. P. Act, 1854, s. 56. the act applicable to the Lord Mayor's Court.

(*m*) Ord. XLV. (10); C. L. P. Act, s. 57.

(*o*) *Westoby v. Day*, 2 El. & Bl. 605.

(*n*) And see Order in Council, 17th Nov. 1863, making the provisions of

(*p*) *Matthey v. Wiseman*, 18 C. B., N. S. 657; 11 Jur., N. S. 603.

(*q*) *Magrath v. Hardy*, 4 Bing. N. C. 782.

Court, although the garnishee has no notice of the fact (*r*); and as the customary process was exclusively personal, and debts when attached were levied and delivered, the custom does not authorize an attachment against a debt due from, or a writ of *fi. fa.* against the goods of, a corporation (*s*). The custom is excepted from the operation of the Debtors Act, 1869 (c. 62), s. 29; and both before and since that statute, it only authorizes the detention of a debtor until judgment, and gives no right to charge him in execution (*t*).

CHAPTER V. PART 6.—OF THE RIGHTS OF SALE AND FORECLOSURE.

792. *When the Liability to Sale arises.*

736. *Of the Right to sell under an Express or Statutory Power.*

825. *Of Sale by Judicial Process in the Court of Chancery and therein—*

834. *Of the relative Rights of Foreclosure and Sale.*

856. *Of Sales by the Court of Exchequer for the Recovery of Crown Debts.*

857. *Of Sale by the Admiralty Division of the Supreme Court.*

858. *Of Foreclosure under the Liquidation Act, 1868.*

859. *Of Sale by the Court of Bankruptcy.*

792. The incumbered property may become liable to be sold, either by the incumbrancer himself, or by judicial process:

By the incumbrancer,

1. Under a power incident to his security.
2. By virtue of an express contract with the debtor.
3. Under a statutory power. .

By judicial process,

4. Under powers created or modified by statute, or originally vested in the court by which they are exercised.

793. The first kind of power of sale is vested (*u*) in a mort-

(*r*) *Westoby v. Day*; and see Com. Dig. Attachment, D.; *Giles v. Nathan*, 1. Marsh. 226; *Robinson v. Nesbitt*, L. R., 3 C. B. 264.

(*s*) *London Joint Stock Bank v. Mayor of London*, L. R., 1 C. P. D. 1.

(*t*) *Wilkins, Re*, 8 Q. B. 107.

(*u*) *Lockwood v. Ewer*, 2 Atk. 303; *Kemp v. Westbrook*, 1 Ves. 278; *Harrison v. Franks*, 2 Eq. Ca. Abr. 725; *Wilson v. Tooker*, 5 Bro. P. C. 193; *Pothonier v. Dawson*, Holt, N. P. R.

gagee or pledgee of a personal chattel, or of stock, a policy of insurance, or other *choses in action*, who, by virtue of the implied contract that the pledge shall be made effectual to discharge the debt (83), is entitled without any express power to sell the subject of the security *ex mero motu* (subject to the statutory provisions concerning sales by pawnbrokers) (824), upon non-payment of the debt, when a day has been fixed for the payment, but only after a proper demand and notice, where no day has been fixed; the mortgagee of a chattel, besides this right, being also entitled to a decree of foreclosure (*x*). But the security cannot be sold until the debt becomes payable (*y*).

794. But the holder of a chattel under a specific possessory lien (252, 1361), having a mere personal right which continues only during possession, and out of which arises no such contract as is implied in the case of a pawn, cannot sell, but has only a right of retainer (*z*). Therefore, an innkeeper, in answer to an action of trover for the conversion of a horse, cannot set up the defence that the plaintiff being indebted to

383; *Dyson v. Morris*, 1 Hare, 413; *Pigot v. Cubley*, 15 C. B., N. S. 701; 10 Jur., N. S. 318; Story, Bailm. §§ 308, 309. So by the Roman law. Mackelvey, Syst. Jur. Rom. s. 316; see *Martin v. Reid*, 11 C. B., N. S. 730. The Statute Law Consolidation Act of 1861, relating to larceny, after providing for the punishment of fraudulent sales and pledges by agents, bankers and factors, declares, that nothing in the act relating to agents shall affect any mortgagee of real or personal property in respect of any act done in relation to the property comprised in or affected by the mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money which shall be or become actually due or payable by virtue of any valuable security; nor from selling, transferring or disposing of any securities or effects in his possession upon which he shall have any lien, claim or

demand entitling him by law to do so, *unless such sale, transfer or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand.* (24 & 25 Vict. c. 96, s. 75; and see s. 76.)

(*x*) *Harrison v. Hart*, 2 Eq. Ca. Abr.; 6 Comyn, 393; *Tancred v. Potter*, 2 Fonbl. Eq. 261, n. Glanvill indicates an equivalent remedy. (Book 10, cc. 6, 7, 8.) Story says (Bailm. § 310), that the pawnee may file a bill for foreclosure; he must have meant the *mortgagee*: for the special property of the pawnee cannot by foreclosure be turned into an absolute ownership.

(*y*) *Langton v. White*, L. R., 6 Eq. 165.

(*z*) *Thames Iron Works Co. v. Patent Derrick Co.*, 1 J. & H. 93; 6 Jur., N. S. 1013; *Clark v. Gilbert*, 2 Bing. N. C. 343; 2 Sc. 520. Per Parke, B., *Legg v. Evans*, 6 M. & W. 36.

him for the keep of it in a sum which was beyond the value, he sold it (*a*); unless indeed he can plead the custom of London (*b*), or Exeter (*c*), where if a horse left with an innkeeper without any special bargain for his keep, have eaten beyond his value, the innkeeper, upon a reasonable appraisement, may sell him to satisfy the debt due for his meat only. But in general there is no such right in a person holding a chattel under a lien for money due to him in respect of it; and if he sell it he will become liable in trover for the value. This rule applies also to the lien upon a chattel for unpaid purchase-money (*d*), though it may be otherwise in particular cases; as in the tea trade, where it is the custom for the vendor to be paid partly by an immediate deposit, with the balance at a future time, and the vendor retains the teas, or the warrants which represent them, and on non-payment of the balance may sell and charge the purchaser with the deficiency, together with interest and other charges; though on his bankruptcy the vendor is not bound to sell of his own authority, but may properly apply for an order of the Court of Bankruptcy (*e*).

The lien of the solicitor upon his client's papers, though a general lien, also confers a mere right of retainer (252), and if he sell or concur in the sale of the documents he will be liable in trover, or for the proceeds of the sale (*f*).

795. The mortgagee or pawnee of chattels, who sells either under a special or implied power, is bound to account for the proceeds, to pay over to the owner the surplus of the purchase-money beyond his demand, and the necessary expenses and charges, and to return any unsold part of the security to the mortgagor; and if he attempt to dispose of the money so as to prejudice any person entitled to receive it, he may be

(*a*) *Jones v. Pearle*, 1 Str. 557. Per Pratt, C. J., in *Jones v. Thurloe*, 8 Mod. 172.

(*b*) *Jones v. Pearle*, *supra*; *Robinson v. Walter*, 3 Bulst. 269; *Moss v. Townsend*, 1 id. 207; *Hostler*, Case of, Yelv. 66.

(*c*) *Cross on Lien*, 343.

(*d*) Per Buller, J., in *Lickbarrow v. Mason*, 6 East, 24, n.

(*e*) *Moffatt, Exp.*, 1 M., D. & De G. 282; affirmed on appeal; *Twining, Exp.*, id. 691.

(*f*) *Clark v. Gilbert*, 2 Bing. N. C. 353; 2 Sc. 520.

ordered to pay it into court, and a receiver may be appointed of the proceeds of any part of the property which may remain unsold (*g*) (1504).

Of the Right to sell under an express Power.

796. An express right in the mortgagee to sell may be created, either by a trust for sale on default of payment at the time fixed, or by a power; and generally, but not necessarily, the trust or power is directed not to be exercised until the expiration of a previous notice to the owner of the equity of redemption, so that he may have a further opportunity of saving the estate by payment of the debt.

Of these forms of security the most usual and the safest is the power of sale; for although a security by way of trust (whether the trust be vested in the creditor or in a third person) to secure the debt, and subject thereto for the mortgagor, is substantially a mortgage and does not create an express trust for the benefit of the mortgagor, but falls within the ordinary provision of the Statute of Limitations (*h*) relating to mortgages (*i*), it is yet subject to the doctrine of conversion and other doctrines, which may cause serious inconvenience both to the mortgagor and the mortgagee (*k*).

The power will not be affected by a joint demise made by the mortgagor and mortgagee to a receiver, upon trust at the request of the mortgagee during the continuance of the security, and afterwards of the mortgagor, to grant leases, but to permit the mortgagor to receive the rents until default, and after default to receive and apply them in keeping down the interest. The receiver in such a case will be bound to join in conveying to a purchaser from the mortgagee under the power, without the concurrence of the mortgagor (*l*).

(*g*) Story, Bailments, § 343; Wilson v. Tooker, 5 Bro. P. C. 193; Com. Dig. Mortgage, B.; Harrison v. Hart, 2 Eq. Ca. Abr. 6.

(*h*) 3 & 4 Will. 4, c. 27, s. 28. See Real Property Limitation Act, 1874 (c. 57), s. 7.

(*i*) Kirkwood v. Thompson, 2 H. & M. 392; 2 De G., J. & S. 617; Locking v. Parker, L. R., 8 Ch. 30.

(*k*) See Anon., 6 Mad. 10; Underwood, Re, 3 K. & J. 745.

(*l*) King v. Heenan, 3 De G., M. & G. 890.

797. The power is given as an additional remedy for the recovery of the debt. The use of it therefore by the mortgagee for the purpose of oppression, or to effect the collateral objects of himself or others, will make the sale invalid both at law and in equity (*m*). And the mortgagor may recover at law, money which he has paid by compulsion to the mortgagee's solicitor, to prevent the exercise of the power of sale (*n*).

798. A sale may also be set aside (unless it be protected by the terms of the power), on account of neglect or irregularity in the fulfilment of the conditions under which it ought to have been exercised. Therefore where there was a power to sell by public auction, and if the ship, which was the subject of the power, could not be sold, the mortgagee was to have the sole use and control of it as owner until the debt should be paid, it was considered that there was an agreement by the mortgagee not to sell in any but the specified manner, and a sale by private contract was set aside (*o*).

But a stronger case must be made to induce the court to interrupt a sale (when there is only a possibility of damage), than to set it aside afterwards (*p*). The pleadings in a suit for these purposes must clearly disclose the fraud or irregularity in respect of which relief is sought (*q*); and the court will not interfere merely on account of an exercise of the legal right, contrary to the wishes or the interests of the mortgagor (*r*).

The court will prevent a sale which would expose the mortgagor to liability under a contract made prior to the mortgage, and of which the mortgagee had notice (*s*). And will do so

(*m*) *Davey v. Durrant*, 1 De G. & J. 535; *Whitworth v. Rhodes*, 20 L. J., N. S., Ch. 105; *Robertson v. Norris*, 1 Gif. 421; 4 Jur., N. S. 443; *Jones v. Matthie*, 11 Jur. 504; *Thurlow v. Mackeson*, L. R., 4 Q. B. 97.

(*n*) *Close v. Phipps*, 8 Scott, N. R. 381; 7 M. & G. 586.

(*o*) *Brouard v. Dumaresque*, 3 Moo. P. C. 457.

(*p*) *Kershaw v. Kalow*, 1 Jur., N. S. 974.

(*q*) *Adams v. Scott*, 7 W. R. 213, V.-C. Wood.

(*r*) *Jones v. Matthie*, *supra*.

(*s*) *De Mattos v. Gibson*, 5 Jur., N. S. 347; 4 De G. & J. 276.

at the instance of the person with whom the mortgagor has contracted.

799. The mortgagee, upon tender, even in the auction room, of all that is due, is bound to stop the sale (*t*); and even where (the costs being unascertained, and the security ample) the principal and interest only were tendered, with the knowledge of the purchaser, and refused, the sale was set aside. The pendency of a suit to redeem by a puisné incumbrancer, who has previously given the usual notice to redeem, and has made out a *primâ facie* title as an incumbrancer, also prevents the exercise of the power (*u*); but it cannot be suspended by the mere filing of a redemption bill (*x*).

800. The mortgagee who sells (except where in judicial sales he obtains leave to bid), or his trustee, are not allowed to purchase the mortgaged estate (*y*); and a mortgagee, who is also trustee of the estate, will not have leave to bid if the cestuis que trust object, until attempts to sell to others have failed (*z*); and even the employment by the purchaser of the clerk of the mortgagee's solicitor as a bidder is sufficient to invalidate the sale, and to burthen the estate of the purchaser with the costs of a redemption suit, so far as it was occasioned by the sale (*a*). The same rule prevents the pledgee who sells from buying the pawn (*b*). But a creditor made a trustee for sale, in order to secure the debt, but who has never attempted to execute the trust deed, is considered simply as a creditor with security, and is not disqualified from purchasing (*c*). And a puisné mortgagee, even though his own security be in the form of a trust for sale, may buy from the prior mortgagee selling under his power, and may in all respects, as

(*t*) *Jenkins v. Jones*, 2 Gif. 99.

(*u*) *Rhodes v. Buckland*, 16 Beav. 212.

(*x*) *Adams v. Scott*, 7 W. R. 213, V.-C. Wood.

(*y*) *Downes v. Grazebrook*, 3 Mer. 200; *Bloye's Trust*, Re, 1 Mac. & G. 488.

(*z*) *Tennant v. Trenchard*, L. R., 4 Ch. 537.

(*a*) *Parnell v. Tyler*, 2 L. J. (Ch.) N. S. 195.

(*b*) *Story*, Bailments, § 319.

(*c*) *Chambers v. Waters*, 3 Sim. 42; *S. C. Waters v. Groom*, 11 Cl. & F. 684.

if he were a stranger to the estate, acquire an irredeemable title (*d*), provided he have not availed himself of his position as mortgagee to obtain an undue advantage in the purchase, or otherwise acted *malâ fide* (*e*).

An execution creditor may also buy the property sold under the execution, the sheriff, and not the creditor, being the seller (*f*).

801. It should be stipulated that the power of sale shall not be exercised until after the expiration of a certain notice; and it has been said that a power to sell without notice is of an oppressive character (*g*). But if it be provided that the purchaser shall not be affected by the absence of such notice, and that the mortgagor's remedy shall be by action for damages, there is no jurisdiction to restrain the sale without notice (*h*). And unless the right to sell be vested in a trustee, whose duty binds him to give notice to both parties, the court will not generally stop the sale on the ground that the required notice has not been given, but will leave the mortgagor to file a bill to impeach the sale, and to give notice to the purchaser that he has done so (*i*). Notice to the mortgagor's executor will be sufficient, although he has no interest in the property, if the power provides that he or the heir may be served (*k*); but if there be no person in existence to whom, under the terms of the power, notice should be given, the power cannot be exercised (*l*).

It appears unnecessary to provide that the notice shall be valid, notwithstanding the disability of the person on whom it

(*d*) *Shaw v. Bunny*, 33 Beav. 494; 2 De G., J. & S. 474; 34 L. J. (Ch.) 257; 11 Jur., N. S. 99, dubitante Turner, L. J.; *Kirkwood v. Thompson*, 2 H. & M. 392; 11 Jur., N. S. 385; 2 De G., J. & S. 613. And see per Kindersley, V.-C., *Parkinson v. Hanbury*, 1 D. & S. 143, and 2 De G., J. & S. 450, and observations of Turner, L. J., there; but note that the trust there considered was not part of the security.

(*e*) See per Knight Bruce, L. J., in *Shaw v. Bunny*.

(*f*) *Stratford v. Twynam*, Jac. 418.

(*g*) *Miller v. Cook*, L. R., 10 Eq. 641, per Stuart, V.-C.

(*h*) *Prichard v. Wilson*, 10 Jur., N. S. 330.

(*i*) *Anon.*, 6 Mad. 10.

(*k*) *Gill v. Newm*, 14 W. R. 490.

(*l*) *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; L. R., 2 E. & I. App. 1.

is served (*m*); and under the usual provision for service of the notice, by delivering or leaving it at the last place of abode of the person entitled to service, it is sufficient to fix it to the door of the house which answers that description (*n*).

The sale, if not made till the expiration of the proper interval after the service or delivery of the notice, is not invalid because the notice declared the intention to sell when that interval had elapsed from its date (*o*); nor because the agreement for sale was made before the expiration of the notice, if the agreement were conditional upon non-redemption in the meantime (*p*). If the length of the notice be not specified a reasonable notice must be given, and it seems that notice to pay on the day upon which the notice is given is not reasonable (*q*).

802. It is usual and proper to provide that a purchaser shall not be affected by express knowledge that the notice required by the power has not been given; for a mere provision, that the purchaser shall not be bound to ascertain or inquire into the existence of notice, will not protect him against actual knowledge that no notice was given (*r*). And in the absence of this clause a purchaser will not be held to his contract for a simple title under the power of sale, where no notice has been given, and the mortgagor has assigned his interest; though both he and the assignees be ready to ratify the sale (*s*).

803. The power should be so framed that it may be exercised not only by the original mortgagee or mortgagees, but also by

(*m*) *Tracy v. Lawrence*, 2 Dr. 403. A notice of dissolution of partnership properly given under the articles is good, though the partner served be insane. (*Robertson v. Lockie*, 15 L. J. (Ch.) 379.)

(*n*) *Major v. Ward*, 5 Hare, 598.

(*o*) *Metters v. Brown*, 9 Jur., N. S. 958; 33 L. J. (Ch.) 97.

(*p*) *Major v. Ward*, *supra*.

(*q*) *Rogers v. Mutton*, 7 H. & N. 733; *Massey v. Sladen*, L. R., 4 Ex. 13.

(*r*) *Parkinson v. Hanbury*, 1 Dr. &

Sm. 143; 2 De G., J. & S. 450. In *Ford v. Healy*, 3 Jur., N. S. 1116, the mortgagor, after conveying to trustees for the benefit of his creditors, had given the mortgagee an authority to sell, agreeing to waive notice and to convey, which he afterwards refused to do; the objection that his concurrence was necessary was ultimately held not to be sustainable, but the reasons for this decision do not appear.

(*s*) *Foster v. Haggart*, 15 Q. B. 155; 14 Jur. 757.

those who represent them upon any change of interest. To this end it may safely be given, where there are several mortgagees, to the mortgagees and the survivors and survivor of them, his executors or administrators, and their or his assigns; but it is now a common precaution to vest it also expressly in all persons entitled to give a receipt for the mortgage debt; a form which also calls attention to the rule that it should be given to the personal, and not to the real, representatives of the mortgagee.

804. The devisees of the surviving mortgagee, where the power is not given to assigns, cannot exercise it though assigns be included among the persons entitled to give receipts, and to dispose of the proceeds of sale (*t*). And the same has been held as to the power of the surviving trustee, where he was not expressly included in the power, but only in the receipt clause (*u*). But the most liberal construction is now given to the power in this respect. And where it was given to two mortgagees, their heirs and assigns, and the security contained a joint account clause, the power was held (*x*) to vest in the surviving mortgagee, on the ground of the assumed intention to make the security of the fee simple available, to the same extent and in the same manner in which the mortgagees were entitled to the money and the land. A power vested in the heirs and assigns of the surviving donee has been long since held to pass to the devisees of the survivor (*y*). And a power to the assigns of a mortgagee, to sell and give receipts, extends to the administra-

(*t*) *Bradford v. Belfield*, 2 Sim. 264; *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & S. 475; *McDonald v. Walker*, 14 Beav. 556. And see *Stevens v. Austen*, 7 Jur., N. S. 879. It has been suggested, that where the power is reserved to the mortgagee, his heirs and assigns, it should be expressly vested in every person in whom the legal estate should become vested by devise, conveyance or otherwise. (1 *Jarm. Wills*, 679, note (*c*), ed. 3.)

But this seems unnecessary if the power be properly framed; and, as already observed, it should not be vested in the heirs of the mortgagee.

(*u*) *Townsend v. Wilson*, 1 B. & Ald. 608; but disapproved of by Lord Eldon, *Hall v. Dewes*, Jac. 189.

(*x*) *Hind v. Poole*, 1 K. & J. 383; 1 Jur., N. S. 371.

(*y*) *Titley v. Wolstenholme*, 7 Beav. 425.

tor of the transferee of the mortgage, selling with the concurrence of the assignee of the legal estate (*z*).

Where both first and second mortgagees have power to sell and to give receipts, which shall discharge the purchaser from seeing to the application of the purchase-money, they may concur in a sale; the one giving a receipt only for so much of the purchase-money as will discharge his debt, and the other for the balance (*a*).

805. The continuance of the power, upon a transfer of the security, should be provided for. It will not necessarily be extinguished because of the absence of such a provision; and a general assignment of all covenants, provisoes, &c., and of all other securities, will carry it (*b*). But on the alteration of a mortgage by a further charge and additional security, without recognition of the power, it was held that, if not extinguished, its existence was so doubtful that the purchaser might recover his deposit (*c*).

Care should also be taken, lest in transferring the power of sale to a sub-mortgagee, it be not altogether extinguished in the original mortgagee (*d*) (**1328**).

806. The power may be extended by reference in another instrument to property not specifically included in it; as where a legal mortgage with power of sale was made of part of an estate, with an agreement to deposit, when executed, the lease of the other part as a further and collateral security for the debt, which was described as secured on the former part of the estate, the power was held to affect the equitable interest of the mortgagee in the property comprised in the deposited lease (*e*).

807. A provision in a trust for sale of an equity of redemp-

(*z*) *Saloway v. Strawbridge*, 1 K. & J. 371; 7 De G., M. & G. 594.

(*a*) *McCarogher v. Whieldon*, 34 Beav. 107.

(*b*) *Young v. Roberts*, 15 Beav. 558.

(*c*) *Curling v. Shuttleworth*, 6 Bing. 121; 3 M. & P. 368.

(*d*) See *Cruse v. Nowell*, 25 L. J. (Ch.) 709.

(*e*) *Ashworth v. Mounsey*, 3 C. L. R. 418; 9 Exch. 175.

tion, that the purchase-money shall be applied in payment of the prior mortgage, allows a sale to be made subject to that mortgage (*f*).

808. If only authorized to sell by public auction the mortgagee cannot sell privately; but where either mode of sale is permitted, a private sale, even without advertisement, is good, so that it be made *bonâ fide* and for a fair price (*g*).

809. The mortgagee should avoid the use of unnecessarily stringent conditions of sale. Such as are commonly used by conveyancers are, as a general rule, safe for mortgagees, who will not however be restrained from adding such further conditions, adapted to the state of the title, as may be reasonably used in the disposal of his property by a prudent owner, anxious to protect himself against the risk and expense of litigation; a risk which it is as much for the benefit of the mortgagor as of the mortgagee to avoid, and the proper avoidance of which outweighs the possible diminution in the number and value of the biddings which may be caused by the conditions (*h*).

He should adhere strictly to the terms of his power, being liable in damages to the mortgagor for any loss occasioned by irregularity in this respect; and if a purchaser buy with notice that the sale was improper, he will not be protected by a declaration that irregularity in the sale shall not affect the purchaser (*i*).

The sale must also be effected with proper discretion; for the mortgagee, as a trustee for the persons interested in the equity of redemption, is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had (*k*).

(*f*) *Manser v. Dix*, 8 De G., M. & G. 703; 3 Jur., N. S. 252.

(*g*) *Brouard v. Dumaresque*, 3 Moo. P. C. 457; *Davey v. Durrant*, 1 De G. & J. 535.

(*h*) *Hobson v. Bell*, 2 Beav. 17; *Kershaw v. Kalow*, 1 Jur., N. S. 974;

Falkner v. Equitable Reversionary Society, 4 Dr. 352. See *Cragg v. Alexander*, W. N. 1867, 305, as to improper condition on sale of reversion.

(*i*) *Jenkins v. Jones*, 2 Gif. 99.

(*k*) *Ferrand v. Clay*, 1 Jur. 165; *Orme v. Wright*, 3 Jur. 19, 972; *Mar-*

810. It has been generally considered, that, unless the mortgagee be specially authorized to accept a mortgage, the sale ought to be only for money in hand, for the power is given to him to be exercised for the recovery of the debt. It has, however, been held that a contract to sell for money may be carried out by a mortgage for the whole purchase-money except the deposit, so that the arrangement be *bonâ fide* (*l*). And it has been intimated that the estate may also be sold upon the terms that part of the money shall remain on mortgage where the seller takes the risk and charges himself in account with the mortgagor with the whole purchase-money, even irrespective of a provision that all arrangements made by the mortgagee shall be as binding as if made with the concurrence of the mortgagor (*m*). The declaration that the receipt of the mortgagee for any money to arise from the sale shall be a good discharge, does not bind the mortgagee to sell for money, but is an additional power to the mortgagee (*n*).

The court has refused to set aside a sale by the first mortgagee on the ground that after making preliminary arrangements (but without a binding contract) for an advantageous sale of the property, he bought up the interest of the second mortgagee at a reduced price, without informing him of such arrangements (*o*).

811. A covenant by the mortgagor that he will join in the sale is for the benefit of the mortgagee only, and not of the purchaser (*p*), who is not entitled to claim such concurrence by virtue of the covenant; but he is entitled to a conveyance from the trustee of an outstanding interest which has been declared to be held in trust for better securing the mortgage debt (*q*).

812. Unless excused by the terms of the power, the mort-

riott *v.* Anchor Reversionary Co., 7 Jur., N. S. 155; 2 Gif. 457, per Stuart, V.-C.

(*l*) Thurlow *v.* Mackeson, L. R., 4 Q. B. 97.

(*m*) Davey *v.* Durrant, 1 De G. & J. 535.

(*n*) Thurlow *v.* Mackeson, *supra*.

(*o*) Dolman *v.* Nokes, 22 Beav. 402.

(*p*) Corder *v.* Morgan, 18 Ves. 344.

(*q*) Hampshire *v.* Bradley, 2 Col. 34.

gagee is bound to obtain for the purchaser proper evidence of the facts which entitle him to exercise the power. His unsupported statutory declaration, being the evidence of an interested person, will not be sufficient for the purpose (*r*).

813. The direction as to the disposal of the surplus purchase-money of mortgaged real estate after the death of the mortgagor is variously framed. Sometimes it requires payment to the executors or administrators of the mortgagor; a form which is open to the objection (*s*) that it is not the office of the mortgagee to change the equities of the persons entitled subject to the mortgage, *i. e.*, to effect a conversion beyond what is necessary for realizing the mortgage debt. And the rule has been long since adopted, that although the surplus will belong to the personal representative of the mortgagor, if the sale took place during his life, it will, notwithstanding such a direction, pass to his real representative, if the sale were made after his death; because, as the land was unconverted at his death, the money will follow it (*t*). The heirs and assigns are sometimes pointed out by the power as the recipients (*u*): but if the mortgagor by his will should effect an absolute conversion of his real estate, this form will be no more correct than the other; for the above decision shows that the money is ultimately bound by the actual equities, and not by the terms of the deed. A third and somewhat elaborate declaration gives the surplus to the executors, administrators or assigns of the mortgagor, if the sale shall take place during his life, but to his heirs or assigns if it shall happen after his death; but this also may be rendered nugatory by the will of the mortgagor. Lastly, the surplus may be directed to be paid to the mortgagor, his heirs, executors, administrators

(*r*) *Hobson v. Bell*, 2 Beav. 17; 3 Jur. 190.

(*s*) See Davidson's Conv. vol. 2, p. 629, ed. 3.

(*t*) *Wright v. Rose*, 2 Sim. & St. 323; *Bourne v. Bourne*, 2 Hare, 35; *Smith, Re*, 7 Jur., N. S. 903. But in the latter case, on the death of the

heir or devisee, it will pass to his personal representative, who may recover it from the mortgagee as money had and received. (*Hardy v. Felton*, 14 L. T. 346.) See *Underwood, Re*, 3 K. & J. 745; *Locking v. Parker*, L. R., 8 Ch. 30.

(*u*) See Davidson's Conv., *supra*.

or assigns, according to their respective rights and interests therein. This also has been objected to because it throws upon the mortgagee the responsibility of judging who is the person entitled. But that is done by the law, not by the deed. This form, which has been adopted by the legislature in the statutory power which will presently be considered, does not attempt to lay down any direction which circumstances may render abortive. If no complication arise the law is plain; and the Trustee Relief Act affords complete safety where the title to the surplus money has become doubtful.

814. After the sale, the mortgagee is a trustee of the surplus proceeds, and if he shows an intention to give some claimants an undue advantage, the money will be ordered to be paid into court, and a receiver will be appointed of the proceeds of the property which remains unsold (*x*). If the surplus purchase-money remain unproductive in the hands of the selling mortgagee, in consequence of notice from persons interested not to part with it pending disputes as to the title to it, he is not chargeable with interest (*y*).

815. The most important of the statutory powers of sale is that by which, unless the power be negated by express declaration in the security, and subject to any variations or limitations contained in it, mortgaged real and leasehold estates may be sold by the mortgagee, in the manner and under circumstances similar in many respects to those under which the ordinary power of sale, vested in the mortgagee by the mortgage deed, may be exercised. It is in the following terms (*z*):—Where any principal money is secured or charged by deed on any hereditaments of any tenure (*a*), or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and

(*x*) *Gouthwaite v. Rippon*, 8 L. J., N. S., Ch. 139.

(*y*) *Mathison v. Clark*, 25 L. J. (Ch.) N. S. 29.

(*z*) 23 & 24 Vict. c. 145, ss. 11—16.

(*a*) The act therefore does not apply

to hereditaments which are not the subject of tenure—such as personal annuities descending to the heir. (See *Wynch, Exp.*, 5 De G., M. & G. 188; *Morgan*, Stat. Jur. 300, ed. 4.)

assigns, shall at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium or any insurance, which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have, amongst other powers, operating to the same extent as if they had been in terms conferred by the person creating the charge, a power to sell or concur with any other person in selling the whole or part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

Receipts for purchase-money given by the person or persons exercising the power of sale given by the act shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money (*b*).

No such sale shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers, the title of the purchaser shall not be liable to be impeached on the ground that no case has arisen to authorize the exercise of such power, or that no such notice as aforesaid has been given; but any person damnified by any unauthorized exercise of such power shall have his remedy in damages against the person selling (*c*).

The money arising from any sale effected as aforesaid shall be applied by the person receiving the same as follows: first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal monies then due in respect of such charge: and

(*b*) Sect. 12.

(*c*) Sect. 13.

the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators or assigns, as the case may be (*d*) (813).

The person exercising the power of sale shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person creating the charge had power to dispose of; except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser in such deed (*e*).

At any time after the power of sale shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered or assigned to and were then vested in him, for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made (*f*).

816. The statute applies only to such instruments as were executed after it was passed (*g*); and such of its provisions as affect the powers of mortgagees, apply only to mortgages and charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt (*h*) (1114).

817. The statutory power, though valuable where the power

(*d*) 23 & 24 Vict. c. 145, s. 14.

(*e*) Sect. 15.

(*f*) Sect. 16,

(*g*) Sect. 34.

(*h*) Sect. 24.

of sale has been omitted from the security, is in several respects less convenient than an express power properly framed, and some of its provisions are considered to be objectionable. If, as is usual, the interest on the mortgage be payable half-yearly, it seems doubtful whether the statutory power can be exercised till at least eighteen months have expired from the date of the security. The interest must have been in arrear for six months, and six months' notice must have been given; and in the absence of a provision that the notice may be given before the interest has actually fallen into arrear for six months, an exercise of the power depending upon such a notice could hardly be considered safe.

818. The purchaser's title is protected only where no case has arisen to authorize the exercise of the power, and where no notice has been given. The act is silent as to an improper exercise of the power after it has arisen, and which is irregular, otherwise than by the absence of notice; nor does it protect the purchaser where he has notice of the absence of notice, or of other irregularities; and it gives the person damnified an express remedy in damages only where the exercise of the power was unauthorized, but none where, being authorized, it was improperly exercised either by absence of notice or otherwise.

819. The act also vests the property sold in the purchaser for all the estate and interest therein which the creator of the charge had power to dispose of. Hence it seems that a mortgagee, who has deliberately accepted a mortgage for a term, may by the statute effect a sale of the fee; a right which he can only acquire by consent in a sale in equity, where if the whole estate be sold the mortgagor is entitled to the difference in value between the term and the fee (*i*): it may also enable a mortgagee of part of an estate to vest in a purchaser a right to hold the title deeds, which he himself could not claim under his contract (**458**).

(*i*) See *Foster v. Eddy*, 13 Jur. 761; 18 L. J. (Ch.) N. S. 151; *Cutfield v. Richards*, 26 Beav. 241.

820. The power of sale contained in the form of mortgage given in the schedule to the "Act to facilitate the proof of title to, and the conveyance of real estates" (*k*), is intended, it is presumed, to operate under 23 & 24 Vict. c. 145.

821. In the case of a charge registered under the Transfer of Land Act, 1875, subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale, may at any time, after the expiration of the appointed time, sell and transfer the land on which he has a registered charge or any part thereof, in the same manner as if he were the registered proprietor of such land (*l*). This provision appears to be confined to a charge registered under the act with a power of sale. It contains no reference to a charge registered without an express power, but to which if it were an ordinary mortgage a power of sale would be incident under 23 & 24 Vict. c. 145.

822. Any mortgagee or other person having a power of selling land, may authorize the purchaser to apply to be registered as first proprietor with any title which a proprietor is authorized to be registered with under the act, and may consent to the performance of the contract being conditional on his being so registered; or may himself apply to be registered as such proprietor, with the consent of the persons, if any, whose consent is required to the exercise by the applicant of his power of sale: and the amount of all costs, charges and expenses properly incurred by such person, in and about such application, shall in all cases be ascertained and declared by the registrar, and shall be deemed to be costs, charges and expenses properly incurred by such person in pursuance of his power; and such person may retain or re-imburse the same to himself out of any money coming to him under the power, and he shall not be liable to any account in equity in respect thereof (*m*).

(*k*) 25 & 26 Vict. c. 53. "C. D. or any part thereof respectively."
 shall have power to sell on default of (*l*) 38 & 39 Vict. c. 87, s. 27.
 payment of the principal or interest, (*m*) Id. s. 68.

823. The Merchant Shipping Act, 1854, empowers every registered mortgagee absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there be more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee (*n*).

824. The pawnbroker's right of sale is also declared by statute, which provides for its exercise by public auction under certain regulations, at the expiration of a year and seven days after the day of pledging, although the right of redemption when the pledge is pawned for more than ten shillings continues until sale. The pawnbroker himself may purchase, and on purchasing becomes absolute owner of the pledge.

At any time within three years after the auction at which a pledge pawned for above ten shillings is sold, the holder of the pawn ticket may inspect the entry of the sale in the pawnbroker's book, and in the filled-up catalogue of the auction (authenticated by the signature of the auctioneer), or in either of them. Where the entry shows that the sale produced more than the loan and profit then due, the pawnbroker on demand within three years is bound to pay the surplus, after deducting the necessary costs and charges of the sale, to the holder of the pawn-ticket. But if within twelve months before or after that sale, the sale of another pledge or other pledges of the same person has resulted in a deficit, the pawnbroker may set off the deficit against the surplus, and shall be liable to pay the balance only after such set-off. For every breach by the pawnbroker of these provisions, he is liable to a penalty not exceeding ten pounds (*o*).

Upon the sale of a forfeited pledge the pawnbroker only undertakes that it is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it (*p*).

(*n*) 17 & 18 Vict. c. 104, s. 71.

and see ss. 32 (8), 45.

(*o*) The Pawnbroker's Act, 1872,
c. 93, ss. 19—23, and 5th Schedule;

(*p*) *Morley v. Attenborough*, 13 Jer.
282.

Of Sale by Judicial Process ; and herein of the relative Rights of Foreclosure and Sale.

825. The relief by judicial sale is intimately connected with the right of foreclosure, for which in many cases in England, and always in Ireland, it is substituted; and it will be convenient to point out in the first place the nature and incidents of the form of suit in which one or other of these remedies are decreed.

826. The mortgagee may commence his action (*q*) for foreclosure or sale of the mortgaged estate without taking possession (*r*), which the court will never compel him to do, because he would become liable to an account, but if he have been in possession he ought to state the fact in the pleadings, and the omission to do so may affect his right to costs (*s*). And where the security is copyhold he may sue without taking admittance (*t*). He is not allowed to debate the title to the estate, because the course of the court in a foreclosure suit is only to take away the equity of redemption, and to leave the plaintiff to such remedy as he has, but not to amend it (*u*).

827. The action ought to be expressly framed for the relief sought at the hearing. If, indeed, the prayer be merely for general relief, and the relief adapted to the case made by the bill be redemption or foreclosure, that relief will be granted (*x*); and though it is said that the proper relief will not be given under the general prayer if the plaintiff pray specific relief to which he is not entitled, the court will give leave to amend by adding parties with the necessary introductory statements, and praying proper relief: though not to the extent of making

(*q*) Actions for the foreclosure and redemption of mortgages are assigned to the Chancery Division of the High Court of Justice. (Judicature Act, 1873, s. 34 (3).)

(*r*) Lord Penrhyn v. Hughes, 5 Ves. 106.

(*s*) Binnington v. Harwood, T. & R. 477.

(*t*) Sutton v. Stone, 2 Atk. 101.

(*u*) Anon., 2 Ch. Ca. 244. "And this," adds the reporter, "was the true and ancient course, though of late sometimes the contrary hath been done." (30 Car. 2.)

(*x*) Palk v. Clinton, 12 Ves. 48.

a new case or putting new matter in issue (*y*). But if the case which is made be inapplicable to or inconsistent with the relief prayed at the hearing, as if the rights of a defendant whom it is afterwards sought to foreclose be expressly saved, the suit will be dismissed (*z*).

828. A person interested in part only of a sum due on mortgage, cannot sue for foreclosure of a corresponding part of the estate (*a*). His remedy is to make the other mortgagees, if they refuse, as they may, to join in his suit, defendants; upon which an account will be directed of what is due to the plaintiff, and the other mortgagees: and on payment or default, reconveyance or foreclosure will be decreed in the usual way (*b*). Nor can the mortgagee in the same suit obtain a decree for foreclosure and for the benefit of an agreement which he has made with another person interested in the estate, and which is dependent upon the discharge of the equity of redemption (*c*).

829. A mortgagee, who upon the delivery of bills to him in discharge of his debt, has signed a receipt for the mortgage money, and has delivered the deeds, but has not reconveyed the estate, retains his right of foreclosure if the bills be dishonoured, and there be no evidence of an agreement that the bills were to be taken as an absolute payment (*d*), whether they have proved to be valuable or not; and even if the estate be reconveyed, it seems that by analogy to the right of a vendor (*e*), who has been paid for an estate by bills which are dishonoured (1353), and has signed a receipt as for cash; the mortgagee would retain a lien on the estate for his debt.

(*y*) *Palk v. Clinton*, *ubi sup.*; *Watts v. Hyde*, 2 Ph. 406. See *Page v. Cooper*, 16 Beav. 396. But relief was given under general prayer in *Powney v. Blomberg*, 8 Jur. 746.

(*z*) *Hughes v. Williams*, 3 Mac. & G. 688; and see 1 Hare, 536.

(*a*) *Palmer v. Earl of Carlisle*, 1 Sim. & St. 423. See *Remer v. Stokes*,

4 W. R. 780.

(*b*) *Davenport v. James*, 12 Jur. 827; 7 Hare, 249.

(*c*) *Ledbitter v. Long*, 8 L. J. (Ch.) N. S. 221.

(*d*) *Teed v. Carruthers*, 2 Y. & C. C. C. 31.

(*e*) See *Frail v. Ellis*, 16 Beav. 351; *Grant v. Mills*, 2 Ves. & B. 306.

830. If trustees, authorized to raise money by mortgage, have also authority to give receipts (and such a power is implied where they have power to change and convert the securities (*f*)), it is not necessary, for the mortgagee's title to foreclosure, to show that the money reached the hands of the trustees if they have given a receipt; or that it was duly invested, though it be alleged that the money did not reach their hands, where the mortgagee was no party to the misapplication. And where the original mortgagee is not bound to inquire, his assignee, being a purchaser with the legal estate, is not affected by such a misapplication (*g*).

831. A power of sale in a mortgage does not affect the right of foreclosure (*h*). But a conveyance, charging an estate with a sum of money and interest, and subject thereto in trust for a person therein named, with a power enabling the person in whose favour the charge was made, to sell on default in payment after notice, gives no right of foreclosure, there being no condition upon the breach of which a forfeiture can arise (*i*) (**5**); nor can there be a foreclosure, for the same reason, upon a mere trust for sale in favour of the creditor, though there be added covenants for repayment of the debt and interest, and for title, where they are in accordance with the trusts. The proper relief in suits to realize such securities is a sale (*k*). And there will be neither foreclosure nor sale of a reversionary interest where, upon the construction of the security, it appears that the fund is to be dealt with only when it becomes payable (*l*).

(*f*) Wood v. Harman, 5 Mad. 368. And see now stat. 23 & 24 Vict. c. 145, s. 29.

(*g*) Locke v. Lomas, 5 De G. & S. 326.

(*h*) See Slade v. Rigg, 3 Hare, 35; Wayne v. Hanham, 9 Hare, 62. Mortgagee with power of sale filing bill to foreclose not directed *on motion* to sell. MS. Sir J. Leach, April, 1818, in 1 Mad. Ch. Pr., ed. 3, 668. The italics seem to show that the right to fore-

close was not then thought to be altogether unaffected by the power of sale.

(*i*) Sampson v. Pattison, 1 Hare, 533. See Watson v. Waltham, 2 Ad. & E. 485.

(*k*) Jenkin v. Row, 5 De G. & S. 107; 16 Jur. 1131; Schweitzer v. Mayhew, 31 Beav. 37.

(*l*) Stamford Banking Co. v. Ball, 4 De G., F. & J. 310.

832. The Court of Chancery is empowered by statute (*m*) in any suit for foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure, on such terms as the court shall think fit (1737); and, if the court shall so think fit, without previously determining the priorities of incumbrances or giving the usual or any time to redeem. Provided, that if such request be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court for the purpose of securing the performance of such terms as the court shall think fit to impose on the party making such request.

833. The statute gives no absolute right to the parties to require a sale, but a power to the court to decree it instead of foreclosure; though it is not necessary for the purposes of the act that foreclosure should be expressly prayed; nor is it an objection to the order that the mortgagee has an express power of sale (*n*). The object of the act is to avoid the delay and expense occasioned by successive redemptions, and the court has a considerable discretion in applying its power; which it exercises with a view to the general benefit of the persons interested, without injury to any of them: a sale has been accordingly refused upon evidence, that the land was likely to increase in value, and would not fetch its value upon an immediate sale; so that if it were sold, injury would be done to the mortgagor and the *puiusé* incumbrancers (*o*). The

(*m*) 15 & 16 Vict. c. 86, s. 48; Jud. Act, 1873, s. 34 (2). The Court of Chancery in Ireland in any suit relating to real estate can direct a sale for the purposes of the suit, and to

compel delivery to the purchaser. (19 & 20 Vict. c. 77, s. 6.)

(*n*) Hutton v. Sealy, 4 Jur., N. S. 450.

(*o*) Hurst v. Hurst, 16 Beav. 372.

court has also expressed reluctance to order a sale, unless the complication be such that the common decree cannot be conveniently worked; and therefore (*p*) refused it in a case where there were three mortgages, and the sale was sought by the subsequent incumbrancers only. A complicated state of affairs has not, however, always been thought a necessary condition for the order for sale (*q*), though a case ought to be made for granting it instead of foreclosure (*r*) (1733).

834. Before the passing of the above statute, the Court of Chancery had power in certain cases to sell incumbered estates; and the mode of applying the statutory power being limited by the terms of the act, and the power itself being to a great extent discretionary, it becomes necessary to consider in what cases, and to what extent, a sale of incumbered property may be decreed in equity independently of the statutory power.

The strict right of the legal mortgagee is foreclosure; and, independently of the statute, he had no general right to a sale (*s*), although, in particular cases, he is entitled to that relief.

The rights of the equitable mortgagee are less clear; for there has been some difference of opinion as to the effect, in this particular, of mortgages by deposit of title deeds. The principle has, however, been laid down, that where the equitable security is of such a kind as to entitle its holder to call for a complete legal security (*t*), there the mortgagee's remedy ought to correspond as nearly as may be with that of a legal mortgagee, and the decree should be for foreclosure. But where the equitable security is no more than a charge or lien upon the estate, the only proper relief is by sale (*u*).

Now a right to foreclosure clearly belongs to the mortgagee of the equity of redemption, who is entitled to this relief as

(*p*) *Hiorns v. Holtom*, 16 Jur. 1077.

(*q*) See *Bellamy v. Cockle*, 18 Jur.

465; *Wickham v. Nicholson*, 19 Beav. 38.

(*r*) *Robert v. Price*, 1 W. R. 303.

(*s*) *Tipping v. Power*, 1 Hare, 410.

(*t*) *Parker v. Housefield*, 2 M. & K.

419; *Footner v. Sturgis*, 5 De G. & S. 736; *Jones v. Bailey*, 17 Beav. 582.

(*u*) *Tipping v. Power*, 1 Hare, 405; *Footner v. Sturgis*, 5 De G. & S. 736. See *Toft v. Stephenson*, 7 Hare, 1; and *Tennant v. Trenchard*, L. R., 4 Ch. 537.

against the mortgagor and subsequent mortgagees, without redeeming the first mortgagee (*x*), subject to whose mortgage he has the best right to call for the legal estate. And it seems that upon the principle stated above the *puisné* mortgagee has no right to a sale.

The deposit of title deeds is also entitled to foreclosure, where the deposit is accompanied by an agreement to execute a legal mortgage (*y*). It was also generally considered that where this stipulation exists, foreclosure only may be had. But the doctrine has been modified to this extent, that where the agreement is merely to execute a mortgage when required, the creditor may waive his right to the legal security and the relief which would follow it, and may insist upon a sale under the charge (*z*). The right to foreclosure of equitable mortgagees with a simple deposit or with a memorandum without an agreement to execute a mortgage has been much contested (*a*), but appears to be the necessary consequence of the principle that the deposit is of itself evidence of an agreement to make a legal security, which the court will carry into effect against the mortgagor or any who claim under him with actual or constructive notice of the deposit (*b*) (484); in accordance with which several well-known forms of decree (*c*) (one of which

(*x*) *Slade v. Rigg*, 3 Hare, 38; *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304.

(*y*) *Perry v. Keane*, Coote, App. 582; 6 L. J. (N. S.) Ch. 67; *Pain v. Smith*, 2 M. & K. 418; *Moore v. Perry*, 1 Jur., N. S. 126; *Jones v. Bailey*, 17 Beav. 582; *Cox v. Toole*, 20 Beav. 145; *Underwood v. Joyce*, 7 Jur., N. S. 566. See also *Frail v. Ellis*, 16 Beav. 351.

(*z*) *Matthews v. Goodday*, 8 Jur., N. S. 90.

(*a*) See *Tuckley v. Thompson*, 1 J. & H. 126; 29 L. J. (N. S.) Ch. 548; 2 Sp. Eq. Jur. 792, n.

(*b*) *Featherstone v. Fenwick*, 1784; *Harford v. Carpenter*, 1786; cited 1 Bro. C. C. 269, n. Mr. Spence, however, shows that the Reg. Lib. does not bear out these cases as cited in Brownie, and referred to by Lord Eldon, 14 Ves. 607; *Birch v. Ellames*, 2 Anst. 428; *Wright*,

Exp., 19 Ves. 255; *Wise, Exp.*, M. & M. 65, per Shadwell, V.-C.; *Malone v. Geraghty*, 2 Dr. & W. 246, per Lord St. Leonards. But the terms of the agreement may be such as to exclude the right to a legal mortgage; as where the intention of the deposit was held to be only to secure the deposit for against any loss which he might sustain from joining as surety in a promissory note; and no liability having been incurred, he was entitled only to have the nature of the transaction and the purposes of the deposit reduced to writing. (*Sporle v. Whayman*, 20 Beav. 607; 24 L. J. (Ch.) N. S. 789.

(*c*) *Newton v. Aldous*, and other cases cited 2 M. & K. 421; and Set. Dec. 211, ed. 2. And see *Birch v. Ellames*, *supra*; *Parker v. Housefield*, 2 M. & K. 419; *Tyler v. Webb*, 6 Beav. 552; and deci-

is said to have been penned by Lord Eldon himself) direct, that upon default in payment, the depositce shall be entitled to the premises freed from all equity of redemption, and shall have an absolute conveyance executed by the depositor or owner of the equity of redemption. And the right of the depositce to foreclosure is now well established (*d*).

835. In the case of a registered charge under the Transfer of Land Act, 1875, the registered proprietor of the charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money at the appointed time (*e*). It is, however, submitted that foreclosure is not the only proper remedy; for it is clear that mere depositces of deeds have been long held entitled to a decree for sale (*f*), either against the mortgagor himself or his assignees; and not, as sometimes it seems to have been thought, against the representatives only after his death (*g*). But where there is an express contract for a legal security, there will be no decree for sale, but for foreclosure only, unless the contract be for a mortgage with power of sale, for then there may be a decree for sale (*h*); though such an agreement or power will not affect the right of foreclosure (*i*). But there can be no sale in respect of a parol agreement to deposit a deed, as such a contract does not amount to an equitable mortgage (*k*) (**37**).

836. There has been also a difference of opinion as to the

sion by Turner, V.-C., cited 1 J. & H. 127.

(*d*) *Redmayne v. Forster*, L. R., 2 Eq. 467; *Pryce v. Bury*, L. R., 16 Eq. 153, n., by L. C. and L. J., 1854; *James v. James*, id. 153; and see *Matthews v. Goodday*, 8 Jur., N. S. 90.

(*e*) 38 & 39 Vict. c. 87, s. 26.

(*f*) *Meux v. Ferne*; *Spring v. Allen*, cited 2 M. & K. 422; *Russel v. Russel*, 1 Bro. C. C. 269; *Meller v. Woods*, 1

Keen, 16; *Pain v. Smith*, 2 M. & K. 417; *King v. Leach*, 2 Hare, 57; and see 3 M. & C. 161; *Prescott v. Tyler*, 1 Jur. 470; *Tipping v. Power*, 1 Hare, 405.

(*g*) *Brocklehurst v. Jessop*, 7 Sim. 438; 2 Y. & C. 730, argument.

(*h*) *Lister v. Turner*, 5 Hare, 281.

(*i*) *Perry v. Keane*, Coote, App. 582; 6 L. J. (N. S.) Ch. 67.

(*k*) *Coombe, Exp.*, 4 Mad. 249.

rights of judgment creditors. Prior to the statute 1 & 2 Vict. c. 110, s. 13, a judgment creditor could clearly have no foreclosure, for he had but a general charge upon his debtor's land, and had no right even to a sale in the debtor's lifetime (*l*). But a judgment under the above act is a specific charge, and the judgment creditor is entitled to such and the same remedies in equity, against the hereditaments charged by virtue of the act, or any part thereof, as he would be entitled to in case the person, against whom the judgment shall have been entered up, had power to charge, and had by writing under his hand agreed to charge (not mortgage) the same hereditaments, with the amount of the judgment debt and interest thereon. After the passing of this act, sales were constantly decreed at the suit of judgment creditors (*m*); and it was said by Parker, V.-C., that no foreclosure could be had upon this form of security, because that is the relief proper to an agreement for a mortgage, and not to a mere charge (*n*). A decree was, however, made for foreclosure, at the suit of a judgment creditor, by Wigram, V.-C., in a case (*o*) which afterwards came before Lord Cottenham on another question. The same was done by Lord Romilly, M. R. (*p*), on the ground that the judgment creditor has that which is equivalent to an agreement to execute a legal mortgage, which gives a right to foreclosure. There is, therefore, no difference of opinion as to the principle upon which the judgment creditor's right is founded, but only upon the nature of the interest which is vested in him by the statute. The words which give the creditor the like remedy, as if the debtor had by writing agreed to charge the hereditaments, do not, according to Sir J. Parker's view (*q*), carry the same right to call for a legal security, as is given by an equitable mortgage. But it has been laid down by high authorities, that

(*l*) *Neate v. Duke of Marlborough*, 3 M. & C. 407.

(*m*) *Clare v. Wood*, 4 Hare, 81; *Carlton v. Farlar*, 8 Beav. 525; *Smith v. Hurst*, 10 Hare, 30, 50.

(*n*) *Footner v. Sturgis*, 5 De G. & S. 736.

(*o*) *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591.

(*p*) *Jones v. Bailey*, 17 Beav. 582. Even against the prior mortgagee's application for a sale. (*Messer v. Boyle*, 21 Beav. 559.)

(*q*) See *Footner v. Sturgis*, 5 De G. & S. 736.

the statute confers upon the judgment creditor an equitable estate (*r*), and by giving him the same remedy as if the debtor had signed a memorandum, makes him an equitable mortgagee (*s*). It seems, therefore, that he has the same right as an equitable mortgagee has to foreclosure.

837. His remedy by sale has been facilitated by a statute, not extending to Ireland; which provides (*t*), that every creditor to whom any land of his debtor shall have actually been delivered in execution by virtue of any judgment, statute or recognizance (meaning such only as have been entered up since the passing of the act (*u*)), and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards, while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's (155) interest in such land, the petition being served upon the debtor only; and thereupon the court is to direct all such inquiries as to the nature and particulars of the debtor's interest in the land, and his title thereto, as shall appear necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court, with respect to sales of real estates of deceased persons for the payment of debts, shall be adopted and followed so far as the same may be found convenient and applicable.

If it shall appear on making such inquiries that any other debt due on any judgment, statute or recognizance is a charge on such land, the creditor entitled to the benefit of such charge, whether prior or subsequent to the charge of the petitioner, shall be served with notice of the order for sale, and shall after such service be bound thereby, and shall be at liberty to attend and have the benefit of the proceedings; and the proceeds of the sale shall be distributed among the

(*r*) *Rolleston v. Morton*, 1 Dr. & War. 195. Per Lord St. Leonards.

(*s*) Per Sir G. J. Turner, L. J., 3 De G., M. & G. 530; 17 Jur. 981.

(*t*) 27 & 28 Vict. c. 112, s. 4 (Judgment Law Amendment Act, 1864).

(*u*) *Isle of Wight Ferry Co., Re*, 11 Jur., N. S. 279.

persons found entitled thereto according to their respective priorities (*x*).

Every person claiming any interest in the land through or under the debtor, by any means subsequent to the delivery of the land in execution, shall be bound by the order for sale and by the proceedings consequent thereon (*y*).

838. The words "delivered in execution" are not confined to an actual delivery by the sheriff, but include any act of lawful authority which is equivalent to such a delivery as can be made, having regard to the nature of the property. Therefore, in the case of an equitable interest, the words are satisfied by an order of the Court of Chancery in favour of a judgment creditor seeking the removal of a legal obstacle to the execution of his judgment (*z*). And the judgment creditor may properly file a bill to assert his equitable right, and, on the removal of the impediment, may obtain a sale on petition under the act (*a*); or, as it has been held, he may, without proceeding to redeem the prior incumbrances, have equitable execution by way of sale, and the appointment of a receiver without prejudice to prior incumbrancers (*b*).

839. It has been said that the relief given is substantially a delivery in execution, whether in form it be a writ of assistance or sequestration, or the appointment of a receiver (*c*). • And where a sequestrator was appointed of the estate of a defendant, who was in contempt for the non-payment of money to a creditor, an order for sale was made under the act on the petition of the creditor and of the sequestrator (*d*). But where the sequestration was obtained on a contempt for non-payment of money into court, it was held that neither the

(*x*) Sect. 5.

(*y*) Sect. 6.

(*z*) *Hatton v. Haywood*, L. R., 9 Ch. 229.

(*a*) *Cowbridge Railway Co., Re*, L. R., 5 Eq. 413.

(*b*) *Wells v. Kilpin*, L. R., 18 Eq. 298. It was held in this case that the judgment creditor was not entitled to a

decree for foreclosure; but in *Beckett v. Buckley* (L. R., 17 Eq. 435) such a decree was made by Hall, V.-C.

(*c*) *Hatton v. Haywood*, *supra*, per Lord Selborne; and see Supreme Court of Judicature Amendment Act, 1875, c. 77, Ord. XLII.

(*d*) *Rush, Re*, L. R., 10 Eq. 442.

plaintiff, the sequestrator, nor the court, was a creditor for the purpose of supporting a petition for sale (*e*).

840. An order will not be made for the sale of that which is incapable of seizure—such as a remainder, of which the debtor cannot be seised or possessed within 1 & 2 Vict. c. 110 (*f*);—nor where it does not appear whether the debtor has any saleable interest, or what, if any, is the nature of his interest, without first ascertaining its nature by inquiry (*g*).

841. The order is *ex debito justitiæ*, and will not be prevented, in the case of land belonging to a public company, by the existence of arrangements under which the different classes of shareholders have different interests in the property (*h*).

842. Where the property bound by the judgment consists of a railway or other public undertaking of the like nature, the court will not make an order for sale of the whole property, because the public would lose the benefit of the undertaking, (390); as, for the same reason, it denies foreclosure to the holders of debentures (being mortgages of the undertaking), and limits the remedy to the appointment of a receiver of the tolls and profits (*i*). But under the Judgment Law Amendment Act mentioned above, the court will order a sale of the superfluous lands of the company, subject to the provisions of the Lands Clauses Consolidation Act (*k*); directing, in the first place, inquiries as to the debt, the nature of the lands extended, the interest of the company in them, and the charges thereon (*l*).

843. It seems that the legal or equitable mortgagee has

(*e*) *Johnson v. Burgess*, L. R., 15 Eq. 398. See Supreme Court of Judicature Amendment Act, 1875, c. 77, Ord. XLVII.

(*f*) *South*, Re, L. R., 9 Ch. 369.

(*g*) *Bishops Waltham Railway Co.*, Re, L. R., 2 Ch. 382.

(*h*) *Ogilvie*, Re, L. R., 7 Ch. 174.

(*i*) *Furness v. Caterham Railway Co.*, 25 Beav. 614.

(*k*) 8 & 9 Vict. c. 18, ss. 127—131.

(*l*) *Hull and Hornsea Railway Co.*, Re, L. R., 2 Eq. 262; *Gardner v. London, Chatham and Dover Railway Co.*, L. R., 2 Ch. 385. Where the company did not show by any evidence that the lands were not surplus lands, sale was ordered without inquiry. (*Calne Railway Co.*, Re, L. R., 9 Eq. 658.)

a general right to a sale, where the security is, or is thought to be, scanty (*m*); it is clear, that he may have this relief if he file his bill after the mortgagor's death, stating that the personal estate is deficient; and if the real and personal estate be represented by one person, it is not necessary to pray for an account of the personalty in the first instance (*n*). But it seems that where a sale was desired in a foreclosure suit on account of a defective security, it was necessary to file a supplemental bill (*o*), unless the original bill were taken *pro confesso*, when the decree is according to the statements, without reference to the prayer (*p*).

844. The mortgagee of a reversion (*q*) was also entitled to a sale on account of the unproductiveness of the security; and it is probably for the same reason that this is the proper relief for the mortgagee of an advowson (*r*).

But the mortgagee both of an advowson (*s*) and of a reversion (*t*) is entitled to foreclosure; although in the latter case the subject of the security be a chose in action, and the mortgagee has an express power of sale, and is not in possession of the legal interest: and he is not obliged to submit to a sale.

845. If a sale be desired, the mortgagee should pray for payment or sale, and the court will make the usual decree, upon which if default be made the sale will take place (*u*).

(*m*) Per Lord Hardwicke, 3 Sw. 208, n., *Wiseman v. Carbonell*, where, although there was a bankruptcy, the sale was upon a bill in equity, the security being "deficient." (1 Eq. Ca. Abr. 312.) The general right, where the security is scanty, is perhaps not quite clear. In *Dashwood v. Bithazey* (Mos. 196), a sale was asked because the security was "defective;" by which it has been thought an imperfect, and not a deficient security was meant; but the context, it is submitted, rather shows that the word was used in the latter sense, and the authority of Lord Hardwicke is not to be lightly passed over.

(*n*) *Daniel v. Skipwith*, 2 Bro. C. C. 154.

(*o*) *Nosworthy v. Maynard*, cited Mos. 196.

(*p*) *Dashwood v. Bithazey*, Mos. 196; and see XXII. Cons. Ord. s. 8.

(*q*) *How v. Vigures*, 1 Rep. in Ch. 18 (ed. 3).

(*r*) *Mackenzie v. Robinson*, 3 Atk. 559.

(*s*) *Gardiner v. Griffith*, 2 P. W. 403; see 3 Atk. 559; *Long v. Storie*, 3 De G. & S. 308.

(*t*) *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 9 Hare, 62.

(*u*) *Ponten v. Page*, 1 Mad. Ch. Pr. 664, ed. 3, V.-C. Plumer, 1816.

846. The lien of the unpaid vendor, and other liens upon real estate, are also enforceable by sale (*x*), when they have been established by the decree of a Court of Equity, binding the persons affected by the lien (*y*); and in the case of the vendor's lien, the produce of the sale after payment of the expenses of re-sale will be applied in discharge of the original purchase-money, with a right of proof against the estate of the vendee, if a bankrupt, for the deficiency; and this right of sale may be enforced against land taken by a public company, even after the undertaking is in operation, notwithstanding the public interest, which, however it may be considered, in cases arising between the company and its own creditors, cannot be set up as a ground for taking the property of a stranger without payment (*z*). But the right of the land owner to restrain the company from continuing in possession and using the land for the purposes for which he sold it to them, until payment of the purchase-money, has been denied by the Court of Appeal on interlocutory applications (*a*); though in other cases it has been allowed in the same court and by several of the other judges (*b*); and it seems to be settled generally, that liens against the property of such companies carry the same remedies as other liens upon land (*c*).

847. Other equitable liens may commonly be enforced in the same manner; though a lien upon trust property cannot be so enforced where the effect would be to destroy the object of the trust (*d*).

Amongst equitable liens enforceable by sale may be noted particularly that of the consignee of a West India estate (209).

(*x*) *Hope v. Booth*, 1 B. & Ad. 498.

(*y*) See *A.-G. v. Sittingbourne, &c. Railway Co.*, L. R., 1 Eq. 636.

(*z*) *Walker v. Ware, &c. Railway Co.*, L. R., 1 Eq. 195; *Wing v. Tottenham Railway Co.*, L. R., 3 Ch. 740; *Raper v. Crystal Palace Railway Co.*, 16 W. R. 413; *Williams v. Great Eastern Railway Co.*, id. 821.

(*a*) *Pell v. Northampton and Banbury Junction Railway Co.*, L. R., 2

Ch. App. 100; *Munns v. Isle of Wight Railway Co.*, L. R., 5 Ch. 414.

(*b*) *Cozens v. Bognor Railway Co.*, L. R., 1 Ch. 594, *Turner, L. J.*, dissentiente; *Bishop of Winchester v. Mid Hants Railway Co.*, id. 5 Eq. 17; *Earl St. Germans v. Crystal Palace Co.*, id. 11 Eq. 568.

(*c*) *Wing v. Tottenham Railway Co.*, L. R., 3 Ch. 740.

(*d*) *Darke v. Williamson*, 25 Beav. 622; 4 Jur., N. S. 1010.

which in one instance (*e*) seems to have been considered to be no more than a dormant lien, giving no actual right to a sale of the corpus of the estate. The authorities, however, show that in cases of salvage, the creditor is entitled to be re-imbursed by sale, although that remedy did not arise out of his original security (*f*), and that the remedy also affects the consignee of West India estates; and where the lien affected a slave compensation fund, the fund was ordered to be paid to the consignee (*g*). The lien itself is founded upon the principle of salvage (*h*) (1060), the estate being kept in cultivation by the consignee's advances; as a leasehold estate is preserved from forfeiture by payment of the ground rent, and a ship and cargo by the last of several advances on bottomry; and in cases of slave compensation funds the advances have often been the means of creating a right to the fund by keeping the slaves together until the claim to compensation arose. The lien will accordingly take precedence of all other incumbrances, including securities to the crown (*i*).

848. It was also the practice in the case of an infant heir or devisee of the equity of redemption (*h*), where it was more beneficial for the infant (and in an early case it was said to be proper) (*l*), to direct a sale, with the consent of the mortgagee (*m*), for payment of debts instead of foreclosure, because a sale would bind the infant but a foreclosure would entitle him to a day to show cause against the decree after he came of age (1745); the practice of selling where the court finds it to be for the benefit of the infant, is now followed in the ordinary

(*e*) See *Shaw v. Simpson*, 1 Y. & C. C. C. 735.

(*f*) *Fetherstone v. Mitchell*, 11 Ir. Eq. R. 35; *Locke v. Evans*, id. 52; *Hull v. Browne*, 6 id. 403; *Dru*, 426.

(*g*) *Morrison v. Morrison*, 2 Sm. & G. 564. And see *Tharp*, Re, where it was intimated that policies liable to the lien would be sold if necessary, 2 Sm. & G. 578; and *Bertram v. Davies*, 31 Beav. 429; 9 Jur., N. S. 34, non. *Bernard v. Davies*, 32 L. J., N. S. Ch. 41. And see the decisions in the

W. I. Incumbered Estates Court, *Harriott*, Re, *Pengelly*, Exp., 8 L. T., N. S. 854; *Cust's W. I. I. E. Acts* 271, ed. 2; *M'Dowall*, Re, id. 300.

(*h*) Per Lord St. Leonards, *Tharp*, Re, supra.

(*i*) *M'Dowall*, Re, *Cust*, 300, ed. 2.

(*k*) *Davis v. Dowding*, 2 Keen, 245; *Scholefield v. Henfield*, 7 Sim. 669; 9 id. 470.

(*l*) *Booth v. Rich*, 1 Vern. 295.

(*m*) *Mondey v. Mondey*, 1 Ves. & B. 223; *Adkins v. Graves*, 3 L. J., Ch. 62.

course of foreclosure suits (*n*); but as to the mortgagee's consent the sale must of course be subject to the provisions of 15 & 16 Vict. c. 86, s. 48 (832).

849. If the mortgagor acquires an interest in the security,—as if he become the executor of the mortgagee, or if he be a trustee of the mortgaged estate,—his position as a person whose duty and interest are conflicting, makes it improper that he should have a decree for foreclosure; and sale is the proper remedy (*o*).

850. There can be no decree of foreclosure against the crown, and as the crown cannot upon a sale be compelled to convey, the ordinary course was to direct that the mortgagee should hold and enjoy the estate until the crown should think proper to redeem (*p*), or until the security should be satisfied (*q*), where the mortgagee's interest in the security would allow the making of such an order. If the order could not be so made, and the legal interest was in the crown, the bill was dismissed; but latterly orders for the sale both of freeholds and leaseholds have been made, it being understood that the crown was not pledged to make any grant to a purchaser; or liberty may be given to apply in chambers for an order for sale (*r*). And in a suit for the administration of assets, in which the mortgage was for a term, and the reversion had become vested in the crown, the mortgagee was declared to be at liberty to accept the estate in discharge of his debt, and was declared to be the purchaser thereof, with liberty to apply to the crown for a

(*n*) *Redshaw v. Newbold*, 12 Jur. 833; *Cockburn v. Aukett*, 3 W. R. 641; *Clinton v. Bernard*, Dru. 287.

(*o*) *Lucas v. Seale*, 2 Atk. 56; *Tenant v. Trenchard*, L. R., 4 Eq. 537.

(*p*) *Lutwich's case*, cited 2 Atk. 223; *Reeve v. A.-G.*, Id.

(*q*) *Hodge v. A.-G.*, 3 Y. & C. 342.

(*r*) *Hancock v. A.-G.*, 10 Jur., N. S. 557; *Sutton v. Smith*, cited id. note; *Bartlett v. Rees*, L. R., 12 Eq. 395; and see *Prescott v. Tyler*, 1 Jur. 470;

2 id. 870. Account of what is due on security; order for sale and payment of purchase-money into court; mortgagee to be paid principal, interest and costs; A.-G. to be at liberty to apply for payment of balance after deducting the costs. In *Scott v. Roberts*, 4 W. R. 499, the order, for special reasons, directed foreclosure against mortgagees prior to the crown, and sale if they should not redeem.

grant of the fee, and in the meantime to hold absolutely (*s*) (1236).

851. Sale may be ordered (*t*) where it is the proper remedy, though foreclosure only be prayed, and though there be no right to foreclosure; but upon a bill asking for a sale only, it was said (*u*) that the plaintiff was not entitled to any other relief; which is probably true as a general proposition, foreclosure being an original and general, and sale a special, right; but in the case last cited the mortgage was for a term, with a trust for a sale of the fee. Now as such a security gave no right to a sale of the term, nor to foreclosure of the fee (10) (though the plaintiff contended for the latter relief), it was probably only meant, in the particular case, that on the general prayer for a sale there could be no foreclosure of the term; the opportunity of foreclosing which was accordingly given to the plaintiff by permission to amend his bill.

852. No sale can be made of a mortgaged estate as against a mortgagee with a paramount title without his express consent; except in foreclosure suits, as provided by 15 & 16 Vict. c. 86, s. 48, the sale can only be subject to his mortgage (*x*).

The course is to decree a sale, free from the mortgagee's security if he concurs, but subject to it if he does not; and if he be a party to the suit, he will be required at once to consent or to refuse (*y*).

853. In Ireland, the decree in a foreclosure suit is always for sale (*z*); but this practice makes no difference in the form of the bill, which must still seek redemption or foreclosure, or sale, and cannot be maintained if it pray for sale only (*a*). Nor does

(*s*) *Rogers v. Maule*, 1 Y. & C. C. C. 4.

(*t*) *Jenkin v. Row*, 5 De G. & S. 110; 16 Jur. 1131.

(*u*) *Kerrick v. Saffery*, 7 Sim. 317.

(*x*) *Langton v. Langton*, 7 De G. M. & G. 30; 1 Jur., N. S. 1078.

(*y*) *Wickenden v. Rayson*, 6 De G. M. & G. 210.

(*z*) *Hutton v. Mayne*, 3 Jo. & Lat. 586; and the Irish Chancery Reports, *passim*.

(*a*) *M'Donough v. Shewbridge*, 2 Ha. & B. 555; *Drew v. O'Hara*, Id. 562, note.

the Irish form of decree differ in its nature from a foreclosure decree. It is strictly a decree against the estate, and is made in the same form, whether the security affect the estate only, or reserve a personal remedy also against the debtor (*b*).

854. By the Confirmation of Sales Act, every trustee and other person at or after the passing of the act authorized to dispose of land by way of sale, exchange, partition or enfranchisement, may, unless forbidden by the instrument creating the trust or power, but not without the previous sanction of the Court of Chancery, so dispose thereof with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting or carrying away of such minerals; or may (unless forbidden as aforesaid) dispose in like manner of the minerals, with or without such rights or powers, separately from the residue of the land; and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or, as the case may be, the undisposed of land. The sanction of the court may be obtained on the petition, in a summary way, of the trustee or other person authorized to dispose of the land; and the sanction once obtained extends to dispositions to be made from time to time of any lands comprised in the order, without further application to the court (*c*).

The act extends to mortgagees with power of sale; and a mortgagee may obtain an order under it although he has already commenced and set down for hearing a suit for foreclosure; and the court on being satisfied that the sale of the surface separately from the minerals will be more productive, will make the order notwithstanding the objection of subsequent incumbrancers, and even without requiring them to be served with the petition (*d*).

855. The act which authorizes the investment on real

(*b*) *Wilson v. Lady Dunsany*, 18 Beav. 293; 18 Jur. 762; so in Jamaica, *Gordon v. Horsfall*, 5 Moo. P. C. 393.

(*c*) 25 & 26 Vict. c. 108, s. 2 (1862).

(*d*) *Beaumont's Mortgage Trusts*, Re, L. R., 12 Eq. 86; *Wilkinson's Mortgaged Estates*, Re, L. R., 13 Eq. 634.

securities of public and charitable trust funds, provides (*e*), that in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure or otherwise barred or released, the same shall be thenceforth held in trust to be sold and converted into money, and shall be sold accordingly; and if any decree shall be made in any suit for the purpose of redeeming or enforcing such security, such decree shall direct a sale (in default of redemption) and not a foreclosure of such premises.

Of Sale by the Exchequer Division of the High Court, for the Recovery of Crown Debts.

856. The Exchequer division, on the application of the Attorney-General in a summary way, by motion, may order (*f*) that the right and interest of any debtor to the crown, his heirs and assigns, in any lands, tenements or hereditaments which shall be extended by virtue of any writ of extent or diem clausit extremum, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been so extended, shall be sold as the court shall direct, and be conveyed to the purchaser by the King's remembrancer in the Exchequer, or his deputy, under the direction of the court, by a deed of bargain and sale to be inrolled in the same court; and after conveyance and inrolment, the bargainee, his heirs, executors, administrators and assigns, may hold not only against the extent of the crown, but against the crown debtor or his sureties, and all persons claiming under them, unless by title paramount to and available in law against the extent. And the purchase-monies shall be applied in discharge of the debt to the crown, and of all costs and expenses incurred by the crown in enforcing payment of the debt, as the court shall order; and the surplus monies, if any, are to be paid to the person or persons who would be entitled to the hereditaments sold, if there had not been a sale thereof under

(*e*) 33 & 34 Vict. c. 34, s. 2.

(*f*) 25 Geo. 3, c. 35, s. 1. A commission to find a debt due to the crown is not necessary for authorizing the

issue of these writs; and as to the evidence on which they may be issued, see Crown Suits, &c. Act, 1865, s. 47 (1084), and Jud. Act, 1873, s. 34.

the order of the court, upon motion or petition, to be made upon such notice to the crown, and to be supported by such affidavits or other proofs as to the court shall seem just and reasonable.

The court is also empowered to make orders touching the production, delivery and custody of the title deeds and writings, in the same manner as if a decree had been made by the court for a sale of the lands of a crown debtor, in execution of a trust created for payment of debts by such crown debtor himself (*g*).

Notice should be given to the mortgagee of an application for an order for sale by the crown under an extent, and he ought not to be paid off without a previous reference to ascertain the sum due to him (*h*).

The act has been declared by the Crown Suits, &c. Act, 1865, to authorize the sale of any land taken in execution by virtue of any writ or process of execution issued after the commencement of the latter act, by any court of law or equity, for enforcing the payment of any sum of money to or in favour of the crown (*i*) (1084).

Of Sale by the Admiralty Division of the High Court.

857. The Court of Admiralty (*h*) had power in all cases of bottomry, salvage and claims for wages to decree the sale of the ship against which the proceeding is carried on, unless the demands of the successful suitor were satisfied; and the title conferred by the court is recognized by the laws of this and of all other countries, and is valid against the whole world (*l*). But a sale is not decreed at the instance of a bottomry bondholder, until the court is satisfied by perusal of the bond that it is duly executed, and with maritime risk; and although the bond may be invalid at law, yet if it be apparently regular, and not opposed by the owners of the ship, freight or cargo,

(*g*) 25 Geo. 3, c. 35, s. 2.

(*h*) *The King v. Coombes*, 1 Pr. 207.

(*i*) 28 & 29 Vict. c. 104, s. 50.

(*k*) Jurisdiction transferred to the

High Court of Justice (Judicature Act, 1873, s. 16, and see ss. 34, 42; Act of 1875, s. 11).

(*l*) *Tremont*, 1 W. Rob. 163.

the court will act upon it (*m*); and the holder having shown a *prima facie* title which would entitle him to payment out of the proceeds when brought into the registry, may require that any person who claims an interest shall prove it, before the bondholder is called upon to defend his own claim.

A sale obtained on proceedings founded upon a fraudulent bottomry bond is invalid and will be set aside (*n*).

The court also had jurisdiction over mortgages of ships, and made orders for sale unless it was under the circumstances inequitable to do so (*o*).

A ship under arrest for necessities may be ordered to be removed from a building-yard and to be appraised and sold, without prejudice to claims or liens upon the proceeds of sale, for rent or other charges, if it be shown by affidavit that the amount of the claim in the suit exceeds the present value of the ship, and that she is deteriorating (*p*).

Upon the sale of a ship by order of the Court of Admiralty, for the satisfaction of bottomry or other claims, the title is complete without any delivery of the register. And no order will be made for its delivery against the official agent of a foreign country, who alleges that he detains it under the law of his own country. But the court will order the delivery of the register in the case of a British vessel, because its production at the custom-house may be necessary (*q*).

Of Foreclosure under the Liquidation Act, 1868.

858. By the Liquidation Act, 1868 (*r*), it is provided, for facilitating the claims of secured creditors, that in any case of bankruptcy, arrangement or winding-up within the act, any person being or claiming to be a creditor on the estate in liquidation, and holding or claiming a security, charge or lien on the assets of the estate, may, without suit, give notice in writing to the liquidators and the debtor, stating his debt or demand, and the security, charge or lien which he holds or

(*m*) India, 9 Jur., N. S. 417.

(*n*) Justyn, 6 L. T., N. S. 553.

(*o*) Admiralty Court Act, 1861, c. 10, s. 11; see *Cartwright v. Philpott*,

L. R., 2 P. C. 19.

(*p*) Nordstjernen, Swab. 260.

(*q*) Tremont, 1 W. Rob. 163.

(*r*) 31 & 32 Vict. c. 68. s. 12.

claims, and requiring payment of his debt or demand within a time therein specified, not being less than six months from the delivery of the notice.

Unless the liquidators within the time specified, either comply with the notice or give to the creditor a counter-notice, to the effect that they dispute his right to the security, charge or lien held or claimed by him, then from and after the expiration of the time specified, the creditor shall be entitled and bound to retain and accept in full and final satisfaction of the debt or demand stated in his notice, that portion of the assets on which he holds or claims the security, charge or lien; and all right and title of the liquidators and debtor therein shall thenceforth be foreclosed.

The liquidators and debtor shall, at the cost of the estate, execute and do all things necessary or proper for vesting in the creditor such portion of the assets as aforesaid, free from all right of redemption by such liquidators or debtor.

Of Sale by the Court of Bankruptcy.

859. The Bankruptcy Rules of 1870 provide (*s*), that upon application by motion by any person claiming to be a mortgagee of, or to have security over, any part of the bankrupt's estate or effects, real or personal, and whether such mortgage or security shall be by any deed or otherwise, and whether the same shall be of a legal or equitable nature, the court will inquire whether such person is a mortgagee, or entitled to such security, and for what consideration, and under what circumstances; and if it shall be found that he is such mortgagee, or is entitled to such security, and no sufficient objection shall appear to his title to the sum claimed by him under such mortgage or security, the court will proceed to take an account of the principal, interest and costs due upon such mortgage or security, and of the rents, and profits, dividends, interest or other proceeds received by such person, or by any other person, by his order or for his use, in case he shall have been in possession of the property over which the mortgage or security shall

extend, or any part thereof; and the court will then direct notice to be given in such public papers as it shall think fit, when, and where, and by whom, and in what way, the said premises or property or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly; and that the trustee (unless it be otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application. All proper parties are to join in the conveyance to the purchaser (where necessary), as the court shall direct (*t*).

The monies arising from the sale are to be applied, in the first place, in payment of the costs, charges and expenses of the trustee, of and occasioned by the application to the court, and of and attending such sale, and then in payment and satisfaction of what shall be found due to the mortgagee or person so having security, for principal, interest and costs; and the surplus if any will be paid to the trustee. But in case the monies to arise from the sale shall be insufficient to pay and satisfy what shall be found due to the mortgagee, or person having security, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but not so as to disturb any dividend or dividends already made (*u*).

For the better making such inquiry and taking such account, and making a title to the purchaser, all parties may be examined by the court upon interrogatories or otherwise as it shall think fit, and shall produce before the court upon oath all deeds, papers and writings in their respective custody or power, relating to the estate or effects of the bankrupt, as the court shall direct (*x*).

860. The vendor of real estate who has not conveyed (*y*), and the vendor of personalty, who retains the indicia of the property (*z*), have the same right as a mortgagee to an order

(*t*) Rule 79.

(*u*) Rule 80.

(*x*) Rule 81.

(*y*) Gyde, Exp., 1 Gl. & J. 323;

Lord Seaforth, Exp., 1 Rose, 306.

(*z*) Sheppard, Exp., 2 M. D. & De G. 431; Twining, Exp., 1 id. 691.

for sale, and to prove for the deficiency, and without their consent there will be no sale of the estate on the application of a mortgagee of the bankrupt purchaser; nor even of the bankrupt's interest in the estate, until the vendor has been served with the petition (*a*).

861. There will be no order for sale if the security be open to suspicion of any taint; as (formerly) of usury (*b*); or if it be for money which cannot properly be secured by mortgage (*c*); or if the lender having notice of a trust, lent the money to the trustee for his own purposes (*d*); or where the bankruptcy followed so close upon the deposit as to raise a presumption of fraudulent preference, unless it be rebutted by evidence (*e*). And in such cases, the court always requires satisfactory proof that the security was not made in contemplation of bankruptcy. But the application may be ordered to stand over pending an inquiry into the existence and circumstances attending the creation of the debt and deposit; and to enable the assignees to apply for a delivery of the deeds.

An order for sale was also refused on account of the staleness of the demand, where twelve years had elapsed between the deposit and the application, the bankrupt being dead and there being no written evidence of the debt (*f*).

862. It is not a valid objection to the order for sale, that the period had not expired before which, under the terms of the mortgage, the debt could not be called in; because such a provision has reference to the mortgagee's remedies at the date of the security, when he had the responsibility of the bankrupt as well as of the estate to rely upon: and he cannot be deprived both of interest and of his right to sell (*g*). Nor is the right to a sale affected, in the case of leaseholds, by a

(*a*) Wright, Exp., 3 M. & A. 49.

(*b*) Nunn, Exp., 1 Dea. 393.

(*c*) Wake, Exp., 2 Dea. 352; 3 M. & A. 329.

(*d*) Turner, Exp., 9 Mod. 418.

(*e*) Wake, Exp., 2 Dea. 352; Ainsworth, Exp., id. 568; 3 M. & A. 451; Dewdney, Exp., 4 D. & C. 181; 2 M.

& A. 72; Morgan, Exp., 1 M. D. & De G. 116; Clouten, Exp., 3 id. 187; but see Heathcote, Exp., 2 M. D. & De G. 711.

(*f*) Jones, Exp.; Oliver, Re, 3 M. & A. 327.

(*g*) Bignold, Exp.; Theobald, Re, 3 M. & A. 477.

lessee's covenant not to assign without the license of the lessor (378); though it would be so if the lease were determinable on the committal of an act of bankruptcy (*h*). On an application for a sale of leaseholds the mortgagee will not be ordered to indemnify the assignees against any breach of the covenants: they having had the option of rejecting the lease (*i*).

The mortgagee may waive his special power of sale, and apply to the court for an order for sale in his general character of mortgagee (*h*).

863. If a mortgagee who has made a submortgage become bankrupt, the submortgagee may obtain a sale of the bankrupt's interest in the original security (*l*); but not without a previous inquiry as to the amount due if the original security was for an uncertain sum; though leave will be given to enter a claim for the full amount due to the submortgagee pending the inquiry. If after the submortgage the original mortgagee have bought the equity of redemption, and the assignees reject it, the submortgagee may include it in his sale, and the assignees will be bound to convey to the purchaser (*m*).

864. A deposit of deeds is not necessary to enable the equitable mortgagee to obtain an order for sale (*n*), nor is a memorandum of deposit; though the absence of the latter affects his right to costs (1619). But if the mortgagee have no memorandum, he must produce clear evidence in support of his debt, and his mere allegation will not be admitted against the affidavit of the bankrupt. Therefore, where the bankrupt denied by his affidavit that the security was for past, as well as for present and future advances, the order for sale was prefaced by a declaration that the deposit was for present and future advances only, and

(*h*) *Sherman, Exp.*, Buck, 462; *Bacon, Exp.*, 2 D. & C. 181; *Barnes, Drake, Exp.*, 1 M. D. & De G. 539; *Exp.*, 3 Dea. 223; 3 M. & A. 497.
Baglehole, Exp., 1 Rose, 432.

(*i*) *Fletcher, Exp.*, 1 D. & C. 318;
 see Bkcy. Act, 1869, s. 23.

(*h*) *Hodgson, Exp.*, 1 Gl. & J. 12;

(*l*) *Mackay, Exp.*, 1 M. D. & De G. 550; *Powell, Exp.*, De G. 405.

(*m*) *Tuffnell, Exp.*, 1 M. & A. 620;
 4 D. & C. 29.

(*n*) *Jones, Exp.*, 4 D. & C. 750.

the order reserved the proceeds after payment of such advances, and gave liberty to apply for the purpose of proving the mortgagee's allegation (*o*). If the deposit was made by the solicitor of the bankrupt, it must be shown that he had authority to make it (*p*).

Nor is the right to a sale affected either by an imperfection in the memorandum, or in the deposit, provided the intention to complete the security be shown. Freeholds and leaseholds have alike been ordered to be sold, where the deposit of the deeds relating to both was complete but the memorandum related to one only (*q*), and where both were specified in the memorandum, but the deeds relating to one only were deposited (*r*) (40). Nor is it affected by an arrangement made subsequent to the security, between the mortgagor and a third person, under which the latter acquires an interest in the mortgaged property (*s*). And if an equitable mortgagee take a legal mortgage with notice of the bankruptcy, his right to a sale under the equitable mortgage is only suspended, and revives when the legal security is declared to be inoperative (*t*).

865. But there can be no sale where the security is inoperative for want of compliance with some legal formality—as enrolment (*u*); nor where there can be no proof by the mortgagor for the deficiency,—as if the bankrupt be only a purchaser of the equity of redemption, whose covenant for payment does not make him personally liable for the debt to the mortgagee (*x*) (1123); nor where the title to the mortgaged property is hampered,—as where it consisted of a share of partnership property subject to a right of preëmption, and required the taking of partnership accounts to ascertain its value (*y*); nor where it cannot be separately sold without injury,—as in the case of fixtures in a house

(*o*) *Martin, Exp.*, 2 M. & A. 243;
4 D. & C. 457.

(*p*) *Coleman, Exp.*, 4 Deac. 242.

(*q*) *Robinson, Exp.*, 1 D. & C. 119.

(*r*) *Leathes, Exp.*, 3 D. & C. 112.

(*s*) *Booth, Exp.*, 2 D. & C. 59.

(*t*) *Harvey, Exp.*, 3 Deac. 547; M.
& Ch. 261.

(*u*) *Miller, Exp.*, 3 De G. & S. 553;
18 L. J. (N. S.), Bank. 9.

(*x*) *Keightley, Exp.*; *Stockdale, Re*,
3 De G. & S. 583.

(*y*) *Broadbent, Exp.*, 1 M. & A.
635; 4 D. & C. 3; *Attwood, Exp.*, 2
M. & A. 24.

which was not subject to the security (*z*); nor where the property was subject to other incumbrances belonging to persons not before the court, and the priorities and validity of which were disputed by the petitioner,—sales in such cases being disadvantageous to the bankrupt's estate. But in complicated cases the mortgagee may enter a claim for the whole amount of his debt, until the question of right is determined (*a*). And if part only of the property be the subject of litigated rights, the court will order sale of the other part, without prejudice to the right of the applicant against the part in respect of which the order is refused (*b*). Sale may also be ordered of the separate estate of one partner mortgaged for a partnership debt, where he alone becomes bankrupt, though there will be no proof against his estate (*c*).

866. Where the equitable mortgagee applying for a sale, is also the petitioning creditor, and the assignee, the order for sale will not be made *ex parte*, but will be served on the bankrupt and on one of the creditors, with notice that the service is by order of the court (*d*). And where the applicant was the assignee of another estate, the creditors of which were interested in the security, no order for sale was made until the appointment of persons in the nature of assignees to protect such interest (*e*).

867. The mortgagee who applies for a sale must bring before the court all persons with whom deeds relating to the property have been deposited by the bankrupt (*f*).*

868. If the property be bought in by the assignees, the mortgagee by applying for a second sale waives all claim against the assignees for any difference in the amount of biddings between the first and second sales (*g*).

(*z*) *Sykes, Exp.*, 13 Jur. 486.

(*a*) *Bignold, Exp.*, Francis, Re, 1 Dea. 515; 3 M. & A. 706.

(*b*) *Wace, Exp.*, 2 M. D. & De G. 730.

(*c*) *Lloyd, Exp.*, 3 M. & A. 601; 3 Dea. 305.

(*d*) ———, *Exp.*, Parker, Re, Mont. & Bli. 394.

(*e*) *Haines, Exp.*, 4 Dea. 20; M. & Ch. 32.

(*f*) *Burt, Exp.*, 1 M. D. & De G. 191.

(*g*) *Baldock, Exp.*, 2 D. & C. 60.

CHAPTER V. PART 7.—OF THE CREDITOR'S RIGHT TO PROVE
IN BANKRUPTCY, ADMINISTRATION AND WINDING UP.

869. A creditor holding a specific security on the property of the bankrupt or on any part thereof may, on giving up his security, prove for his whole debt. He shall also be entitled to receive a dividend in respect of the balance due to him after realizing or giving credit for the value of his security in manner and at the time prescribed. A creditor holding such security, and not complying with the foregoing conditions, shall be excluded from all share in any dividend (*h*).

870. The act excepts from the provision, that no creditor shall have any remedy against the property or person of the bankrupt in respect of any debt proveable in the bankruptcy, except as directed by the act; the power of any creditor holding a security upon the property of the bankrupt, to realize or otherwise deal with such security in the same manner as, but for the above provision, he would have been entitled to realize or deal with the same (*i*). A creditor "holding security" is the same as a secured creditor, afterwards defined (*h*) as a creditor holding any mortgage, charge or lien on the bankrupt's estate or any part thereof as security for a debt due to him (*l*). And the provision enables a mortgagee who does not choose to come in under the bankruptcy to use his ordinary remedies for enforcing his security (*m*).

The corresponding provision of the Act of 1849 was held to be applicable to those cases only in which a creditor had obtained security for a registered and admitted debt, and not to such a case as the payment into court of a sum of money to abide the event of a suit concerning a disputed claim; as no debt then arises until judgment, the creditor was entitled to receive the fund (*n*).

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| (<i>h</i>) Bankruptcy Act, 1869, c. 71, | Q. B. 286. |
| s. 40. | (<i>m</i>) <i>White v. Simmons</i> , L. R., 6 Ch. |
| (<i>i</i>) Id. s. 12. | 555. |
| (<i>h</i>) Id. s. 16 (5). | (<i>n</i>) <i>Murray v. Arnold</i> , 9 Jur., N. S. |
| (<i>l</i>) <i>Emanuel v. Bridger</i> , L. R., 9 | 461; see s. 184 of 12 & 13 Vict. c. 106. |

871. A garnishee order, whether it has been made absolute or whether an order *nisi* only has been obtained and served before the bankruptcy of the judgment debtor, or before he has presented a petition for liquidation, is a charge which makes the holder of it a secured creditor within sect. 16 (5) of the act, and a creditor holding security under sect. 12 (o).

872. In the administration of the estates of deceased persons by the Court of Chancery, and in the winding up of companies under the Companies Acts, a rule differing from that above mentioned was adopted. The mortgagee's contract for a right both against the mortgagor's general estate and the security, was held to be paramount; and he was allowed to prove for his whole debt, and also to make what he could of his security, not receiving more than 20s. in the pound, and the debt of the secured creditor was taken as it stood when the claim was sent in, although the security might have been partly realized before adjudication (p). But in the administration by the court of the assets of any person who may die after the 1st November, 1875, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, the assets of which may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (q). This provision does

(o) *Emanuel v. Bridger*, L. R., 9 Q. B. 286; *Lowe v. Blakemore*, L. R., 10 Q. B. 485, dissenting from *Greenway, Exp.*, L. R., 16 Eq. 619; *Stevens v. Phelps*, L. R., 10 Ch. 417, per Mellish, L. J. As to the construction of the word "lien" under the Act of 1849, see *Holmes v. Tutton*, 5 El. & Bl. 65; *Tilbury v. Brown*, 6 Jur., N. S. 1151; 30 L. J., Q. B. 46.

(p) *Mason v. Bogg*, 2 M. & C. 443;

Kellock's case, L. R., 3 Ch. 769; and see *Barned's Banking Co., Re*, *Forwood's claim*, L. R., 5 Ch. 18; *Coup-land's claim*, 8 Eq. 472; 5 Ch. 167; *Leech's claim*, 6 Ch. 388; *Banner v. Johnston*, 5 E. & L., App. 157; *Oxford, &c. Hall Co., Re*, 8 Eq. 691; 5 Ch. 433; *Joint Stock Discount Co., Re*, 5 Ch. 86; *Humber Ironworks Co., Re*, id. 88.

(q) Supreme Court of Judicature Act, 1875, c. 77, s. 10.

not extend to the winding up of a company which was commenced before the act came into operation (*r*).

873. As to the right of proof and retainer, the rule which requires the creditor to elect is considered (*s*) to be a technical rule of bankruptcy, and will not be extended beyond its strict limits. The principle upon which it is founded is, that all creditors should participate equally, and that one ought not to retain part of the estate, and at the same time to prove in competition with the others. But it is obvious that this can only be applied when the security is on the estate of the bankrupt himself, and that where it is on the estate of another person, who is only a surety for the debt, no injury is done to the other creditors by allowing the mortgagee to retain his security (*t*). In such cases the proper course, having regard to the equity of the surety, is for the creditor to prove first for his whole debt against the estate of the bankrupt debtor, and then to come upon the security for the deficiency; for it seems that if the pledge be first sold, and the surety have paid nothing before the bankruptcy, he cannot prove in respect of his loss even on filing a bill (*u*) (**1698**).

874. This exception to the rule as to election is so well established, that it has been said (*x*) to be almost a maxim in bankruptcy, that a security is never to go in reduction of proof, unless it belongs to the estate against which the proof is tendered. Of the numerous cases in which it is applicable, a simple one is that in which the wife's estate is mortgaged to secure the debt of the husband; or where one partner mortgages his separate estate to secure a debt due from the other (*y*).

And where several persons are jointly indebted to a creditor, who holds a security on the separate property of one of the

(*r*) *Joseph Suche & Co., Re*, L. R., 1 Ch. D. 48.

(*s*) *Per Turner, L. J., in Thornton*, Exp., 3 De G. & J. 454.

(*t*) *Goodman, Exp.*, 3 Mad. 373; *Hedderley, Exp.*, 2 M. D. & De G. 487;

Brett, Exp., L. R., 6 Ch. 838.

(*u*) *Kittier v. Raynes*, 1 Cox, 105.

(*x*) *Per Sir G. Rose, Adams, Exp.*, 3 M. & A. 157; *Parr, Exp.*, 1 Rose, 76.

(*y*) *Hedderley, Exp.*, 2 M. D. & De G. 487; *Rodgers, Exp.*, 1 D. & C. 38.

debtors, though he who has given the security be jointly liable with his co-debtors, yet the separate estate is only surety for the joint estate, and the mortgagee may therefore prove against the latter and also retain his security (*z*).

875. The exception has also been extended to the case of a joint security, on joint estate, to secure a joint debt, and a joint and several covenant for payment, so as to enable the mortgagee on the bankruptcy of the firm to prove against the separate estate of each partner, without giving up the joint security, because the subject of the security was not part of the estate against which the proof was made (*a*).

And again, where father and son executed a joint and several bond to a creditor, and the father mortgaged as further security his real estate, which on his death descended to the son, who became bankrupt; it was considered that, apart from any other question, the descent of the mortgaged estate would have brought the case within the general rule; and that though the pledge was not made by the bankrupt, and the property was not his when it was pledged, the mortgage could not have been retained.

But as the other debts of the father, exclusive of the mortgage debt, would have exhausted the estate, so that no beneficial interest passed to the son, the mortgage was allowed to be retained (*b*). The assumption as to the effect of the descent of the estate appears, however, to be in conflict with a decision in a case in which a joint creditor having taken an equitable mortgage from one of his two debtors as security for the joint debt, and the mortgagor having devised the estate to the other debtor, who became bankrupt, it was held that the creditor might both prove and retain; because, though the mortgaged property was vested in the bankrupt, he obtained it by the

(*z*) Peacock, Exp., 2 Cl. & J. 27; Adams, Exp., 3 M. & A. 157.

(*a*) Shepherd, Exp., 2 M. D. & De G. 204; id. 101; *S. C.*, nom. Plummer, 1 Ir., 1 Ph. 56; *Rolfe v. Flower*, L. R., 1 P. C. 27; 3 Mo. P. C., N. S. 365 (Colony

of Victoria); see Davenport, Exp., 1 M. D. & De G. 313; *English and American Bank, Exp.*, L. R., 4 Ch. 49.

(*b*) Turney, Exp., 3 M. D. & De G. 576.

act of another person, and subject to the prior claims of the petitioner (*c*).

876. Another principle leads to the same result, where the proof and security relate to a debt contracted without the authority of him who is entitled to recover it; as where a partner in a bank drew out part of a balance standing to the account of the trustees of a will without their authority, and invested it on an unauthorized security. On the bankruptcy of the bankers it was held that the *cestuis que trust* might prove for the whole balance without giving up the security; both because the security was not part of the bankrupt's estate, and because the persons interested in the trust estate had a right to pursue and make the most of it without relinquishing the liability of the original debtors (*d*).

877. It must however be noted, that though the creditor have a security for a joint debt upon the separate estate of one of the joint debtors, yet if there be no creation of a separate debt, he can only prove against the joint estate (*e*); and if the debt be joint and several, the creditor must elect between the joint and separate estates; and electing to prove against the joint estate, he has no preference over other joint creditors against the surplus of the separate estate over the separate debts (*f*).

The exception from the rule against retainer, and full proof, does not apply where it is only in appearance that the security belongs to a separate estate; and therefore was not admitted where the joint debt was secured by shares in a company, which, though joint property, were standing in the separate names of the joint debtors, in compliance with a rule of the company that no shares should be held jointly (*g*): nor where

(*c*) Bowden, Exp., 1 D. & C. 135.

(*d*) Biddulph, Exp., 3 De G. & S.
587.

(*e*) Leicestershire Banking Co., Exp.,
De G. 292; Lloyd, Exp., 3 M. & A. 601;

3 Dea. 305; Biddulph, Exp., *supra*.

(*f*) Bevan, Exp., 10 Ves. 106.

(*g*) Connell, Exp., 3 Dea. 201; 3 M.
& A. 581.

real estate bought with joint funds is used jointly, and mortgaged to secure a joint debt, can it be contended that because the conveyance was made to the partners as tenants in common, there was for the purpose of this exception to the general rule, a security upon the separate estate of each tenant in common (*h*).

878. The general rule also prevents the creditor from retaining his security, and at the same time proving on a note, part of the consideration for which was interest on a debt covered by the security (*i*).

879. The proving of the debt without disclosing the security, is an election to abandon it, and not a ground for expunging the proof (*k*); and if the mortgagee have elected to give up the security, and to prove, he cannot—after the sale of the estate by the assignees, or after doing acts by which he may have influenced the other creditors, such as receiving dividends, signing the bankrupt's certificate, or the like—retract his proof, and obtain the benefit of the security, even if the proof were made by mistake, and he offer to return any dividend which he may have received (*l*); and the mortgagee has been refused permission to abandon his order for sale, with liberty to prove for the deficiency, and to prove for the whole debt, though the order had not been acted on, and he had obtained it in ignorance of his right (*m*).

But if part of the debt have been realized by sale under a decree, and the remainder of the estate be unsaleable, the mortgagee may prove on his bond for the deficiency, upon giving up the remaining benefit of the decree (*n*). So it seems he may come in and prove if the security fail before

(*h*) Free, Exp., 2 G. & J. 250.

(*i*) Clark, Exp., 1 De G., M. & G. 622.

(*k*) Rolfe, Exp., 3 M. & A. 306; 2 Dea. 422.

(*l*) Downes, Exp., 18 Ves. 290; Solomon, Exp., 1 Gl. & J. 25; Eggington, Exp., Mont. 72.

(*m*) Davenport, Exp., 1 M. D. &

De G. 513; and see Reynal, Exp., 2 id. 637; though it was intimated by the Court of Exchequer, that if proof were made in ignorance of the existence of the security, the Court of Bankruptcy would probably give relief. (Grageon v. Gerrard, 4 Y. & C. 119.)

(*n*) Wyly, Exp., Vern. & Scriv. 518; Greaves, Exp., De G. 119.

the estate is distributed (*v*). And a creditor who has a mortgage for a principal sum, and a further charge secured by the same and other securities, may retain the mortgage for the original debt, and prove for the other debts, upon giving up all the other securities (*p*).

880. Where the creditor holds for his debt, bills or securities deposited with the debtor by a third person, and of greater value than the amount of the debt due from the bankrupt to himself, the creditor may prove and receive dividends on the full value of those securities, till he has received his own debt in full (*q*).

881. If before the bankruptcy the bankrupt deposit a bill for valuable consideration but without indorsement, the assignees may be ordered to indorse it; but in a special form, so that they may not be made personally liable (*r*).

882. Where a surety applies for the sale of property mortgaged to him, as an indemnity against the debt which he has guaranteed, the proceeds of the sale will not be applied either in payment of the creditor, or for the indemnity of the surety, until so much of the creditor's proof as is equal to the amount of the proceeds has been expunged (*s*).

883. An annuity creditor who has a policy of insurance cannot prove until the policy be sold (*t*).

When the security for an annuity is sold, after payment of expenses, the arrears due at the date of the bankruptcy are paid (the subsequent arrears not being proveable), then the value of the annuity as ascertained in the bankruptcy, and the deficiency will be the subject of proof (*u*).

(*v*) *Peake, Exp.*, L. R., 2 Ch. 452,
per *Turner*, L. J.

(*p*) *Allison, Re*, Fonbl. 26.

(*q*) *Crossley, Exp.*, 3 Bro. C. C. 237;
Bloxham, Exp., 6 Ves. 449.

(*r*) *Mowbray, Exp.*, 1 J. & W. 418;

Rhodes, Exp., 2 M. & A. 217.

(*s*) *Sherrington, Exp.*, 1 M. D. &
De G. 195.

(*t*) *Tierney, Exp.*, Mont. 78.

(*u*) *Slack, Exp.*, 1 G. & J. 346; *Key*,
Exp., 1 Mad. 426.

884. A secured creditor for the purpose of voting is deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security, and the amount of such balance shall, until the security be realized, be determined in the prescribed manner. But at or before the meeting he may give up the security to the trustee, and thereupon shall rank as a creditor in respect of the whole sum due to him (*x*).

885. The Court of Chancery has refused to make an order that the assignees of the bankrupt may be declared to have abandoned property equitably mortgaged, even on the consent of the assignees, without evidence showing satisfactorily that the proceedings will be for the benefit of the creditors (*y*).

(*x*) Bankruptcy Act, 1869, s. 16 (4); Gen. Rules, 1870, ss. 99, 100, 101, 272.

(*y*) Wright, Exp., 1 D. & C. 573. The special provisions of the Bankrupt Law Consolidation Act, 1849, relating to proofs by the obligees of bottomry and respondentia bonds, by the assured

under policies of assurance, and by annuity creditors and their sureties, are not in the Bankruptcy Act, 1869. The debts of such persons are provable, and the values of them ascertained, according to the rules of the court, under s. 31 of the latter act.

CHAPTER VI.

OF NOTICE AS IT AFFECTS THE VALIDITY AND PRIORITY OF SECURITIES.

886. *Of the Necessity of Notice to complete the Mortgagee's Title to Personalty.*
 892. *Of Notice by Persons dealing with Incumbered Property.*
 894. *Of the Nature of Notice, and the Conditions under which it arises.*
 898. *To whom Notice should be given.*
 904. *Of Constructive Notice.*
 907. *By Negligence and Fraud.*
 910. *Between Principal and Agent.*
 925. *By Recitals or Reference.*
 946. *By Tenancy.*
 950. *In Dealings with Executors, Administrators and Trustees.*
 955. *By Records, Acts of Parliament and Court Rolls.*
 957. *Registration, Lis Pendens, Judgments and Decrees.*
 970. *Of the Plea of Purchase without Notice.*

886. The validity or the priority of a security often depends upon the giving or withholding, by the owner of it, of certain notices; or upon his receiving, directly or indirectly, notice of circumstances affecting the prior title of the incumbered property.

887. An assignee, whether by way of mortgage or otherwise, of personal property, must, if he can (22, 1048), complete his title by possession. But if possession cannot be had, as in the case of a chattel, the legal right to which is not in the assignor, or which, from other circumstances, cannot be delivered, or, as in the case of a bond debt, or other chose in action, is incapable of delivery, the assignee must give notice to all who have a legal control over the disposition of the property; by which means he places them under the obligation of treating it as his, and protects future

lenders, who make due inquiry, against prior undisclosed incumbrances (*a*). If he neglect to give notice, the assignor, having only parted with an equitable right, is still able to release, receive or re-assign the debt or other property (*b*); and in case of his bankruptcy it will, unless it be a thing in action other than a debt due to him in the course of his trade or business, belong to his creditors as property within the order and disposition clause of the Bankruptcy Act (*c*). The delivery of the evidence of the debt is not sufficient, because it will not prevent the assignor from claiming the debt from the person liable for its payment (*d*).

888. There is no distinction in this matter between legal and equitable incumbrancers; an equitable sub-mortgagee by deposit being as much bound to give notice as an original mortgagee by assignment (*e*). And if written notice have not been given, evidence of mere constructive notice, or of casual conversations, will not alone be sufficient. It must be shown that such an intelligent apprehension of the nature of the incumbrance has been acquired by the trustee, as would induce a reasonable man, or an ordinary man of business, to act upon the information and to regulate his conduct by it in the execution of the trust (*f*). The assignee may, however, at any time complete his title by giving notice, subject to assignments of which earlier notice has been given. And the burthen of

(*a*) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1, 30; *Foster v. Cockrell*, 9 Bligh, N. S. 332; *Monro, Exp.*, Buck, 300; *Jones v. Jones*, 8 Sim. 633; *Williams v. Thorp*, 2 id. 257; *Meux v. Bell*, 1 Hare, 73; *Colvill, Exp.*, Mont. 110; *Tennyson, Exp.*, Mont. & Bl. 67. Certificates of shares in a gas company are within the rule. (*Vallance, Exp.*, 3 M. & A. 224; *Union Bank of Manchester, Exp.*, L. R., 12 Eq. 354.)

(*b*) *Stocks v. Dobson*, 5 De G. & S. 760; 4 De G., M. & G. 11.

* (*c*) 32 & 33 Vict. c. 71, s. 15 (*b*). See *Nutting, Exp.*, 2 M. D. & De G. 302; *Union Bank of Manchester, Exp.*, L. R., 12 Eq. 354; *Barry, Exp.* L. R.,

17 Eq. 113; *Green v. Ingham*, L. R., 2 C. P. 525.* But where, by a deposit, it is only intended to create a lien, and not an equitable assignment, it was held that the assignees of the depositor could not maintain an action at law to recover possession, though no notice have been given. (*Gibson v. Overbury*, 7 M. & W. 555; *Broadbent, app.*, *Varley, resp.*, 12 C. B., N. S. 214.)

(*d*) *Williams v. Thorp*, 2 Sim. 257; *Colville, Exp.*, id. 570, n.

(*e*) *Arkwright, Exp.*, 3 M. D. & De G. 129; *Wood, Exp.*, id. 315.

(*f*) *Lloyd v. Banks*, L. R., 3 Ch. 488; see *Alletson v. Chichester*, L. R., 10 C. P. 319.

showing the absence of notice is upon those who claim against the security (*g*).

889. The rule that notice must be given does not apply where the security consists of a bill of exchange, promissory note payable to order, or other negotiable instrument, whether indorsed or not by the debtor (*h*); nor (by analogy to legal interests in land) to assignments of equitable interests in land or chattels real (*i*); for as at law conveyances of different interests carved out of the freehold take effect according to priority in time, the later not operating till the earlier have ceased, so equity, following the law, treats conveyances of the equity of redemption as interests taken out of the fee are treated at law (*k*), and the mortgagee will not be postponed because he has not given notice. Notice is therefore unnecessary of assignments in equity of incomes payable out of real estate as part of the inheritance (*l*), and of reversionary interests in real estate not directed to be sold (although the parties entitled have, as between themselves, treated their interests as personalty) (*m*), as also of assignments of leaseholds (*n*), and annuities charged thereon (*o*). It is the same if the mortgage be in the form of a trust for sale (*p*).

890. But where the mortgage affects an interest in the proceeds of real estate devised upon trust for sale, or directed to be sold, or a portion to be raised out of real estate, and which can only be received as money, and is not a right to the land itself, notice must be given (*q*).

(*g*) *Stevens, Exp.*, 4 D. & C. 117.

(*h*) *Price, Exp.*, 3 M., D. & De G. 586. The incumbrancer may have an equity to have the security endorsed by the debtor or his assignees. (*Id.* and *Greening, Exp.*, 13 Ves. 206; *Mowbray, Exp.*, 1 J. & W. 428.)

(*i*) *Wilmot v. Pike*, 5 Hare, 14; *Jones v. Jones*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76; *Rooper v. Harrison*, 2 K. & J. 86.

(*k*) *Jones v. Jones*, 8 Sim. 638.

(*l*) *Rochard v. Fulton*, 1 J. & L. 413; 7 Ir. Eq. R. 131.

(*m*) *Lec v. Howlett*, 2 Kay & Jo. 531.

(*n*) *Jones v. Jones*, 8 Sim. 633.

(*o*) *Wiltshire v. Rabbits*, 14 Sim. 76.

(*p*) *Wilmot v. Pike*, 5 Hare, 14.

(*q*) *Lec v. Howlett*, 2 K. & Jo. 531; *Consolidated Investment Co. v. Riley*, 1 Gif. 371; 5 Jur., N. S. 1283; *Hughes, Re*, 2 H. & M. 89; 10 Jur., N. S. 900. The deposit of a land order of the New

Where a security was given upon a share of property then unconverted, though an administration suit, of which the *puisné* incumbrancer had notice, was pending; it was held (*r*), that he could not, after a sale under a decree in the suit, obtain priority by means of a judge's order charging the produce of the sale in court, even supposing that, as a judgment creditor, he was entitled to the same rights as a purchaser by particular contract for value; which was doubted (*s*).

Where, however, the situation of the property was such, that, though not actually converted at the date of the security, it was considered as being converted, under certain trusts to which it was subject, and, after actual conversion, a *puisné* incumbrancer gave notice to the trustees who held the purchase-moneys, he was held (*t*) to have gained priority over others earlier in time (*u*).

891. It is not necessary in order to complete the title of an assignee of a mortgage, or of a sub-mortgagee, either of land or personal estate, to give notice to the original mortgagor of the assignment of the mortgage debt; because the debt is incident

Zealand Company has been held to require no notice to the company. (Barnett, Exp., De G. 191.) But shares in a canal company, possessing land for the purposes of trade, are not considered to be real estate. (Richardson, Exp., 3 Dea. 496.)

(*r*) Brearcliff v. Dorrington, 4 De G. & S. 122; and see Dunster v. Gleugall, 3 Ir. Ch. 47.

(*s*) But see Boyle, Exp., 17 Jur. 981; 3 De G., M. & G. 515.

(*t*) Foster v. Blackstone, 1 My. & K. 297; 9 Bligh, N. S. 376.

(*u*) The rules concerning conversion require a clear indication of an intention to change the nature of the property; a mere trust to sell in a certain event (in the case of conversion of realty) being insufficient. And if there be a sale under a power or conditional trust for sale in a mortgage, and no more express indication of intention, as to the destination of the surplus monies,

than a direction to pay them to the executors or administrators, or the heirs, executors or administrators of the mortgagor, they will be held to belong to the heir, upon whom the equity of redemption has descended, if the sale be made after the mortgagor's death; otherwise to the executors or administrators of the mortgagor. (Bourne v. Bourne, 2 Hare, 35; Biggs v. Andrews, 5 Sim. 424; Wright v. Rose, 2 Sim. & St. 323.) But under an absolute trust for sale in a deed, the produce will remain personally, though not sold till after the death of the grantor, if the words of the deed be sufficient to change the nature of the property. (Griffith v. Ricketts, 7 Hare, 299; and see Shadforth v. Temple, 10 Sim. 184; Cooper, Re, 17 Jur. 1087; Van v. Barnett, 19 Ves. 102; Griesbach v. Freemantle, 17 Beav. 318; Leigh & Dalz. on Conversion, Ch. 5, 6.)

to the property which forms the security, and which cannot be taken from the assignee without payment (*x*).

Of Notice by Persons dealing with Incumbered Property.

892. It is also the duty of persons who deal with incumbered property, to give to those who are interested in the property, or in the money secured thereon, such notices as will enable them to secure themselves against loss, by ascertaining the nature of the incumbrances already effected, or by regulating their future dealings with the estate or the incumbrance. Such notices should be given by the mortgagor to persons with whom he is dealing for a further advance upon property already incumbered; by the transferee of a mortgage to the mortgagor; and by the mortgagee to those who have claims upon the estate prior to his own. For this reason the mortgagee of an estate for lives ought to give to the lessor notice of his security; for if, without doing so, he should leave the mortgagor in possession as apparent owner, it will be considered as an agreement that the mortgagor shall continue to be tenant for the purpose of paying the fine upon renewal; and the mortgagee will have no remedy (*y*) if the estate be forfeited by the neglect or refusal of the mortgagor under such circumstances to make the payment (*z*).

893. For the prevention of fraud and litigation, courts of equity have, in various cases, made the priorities of incumbrancers dependent upon their performance of this duty; and a statute (*a*) (**1184**), to be more fully noticed hereafter, imposes

(*x*) *Jones v. Gibbons*, 9 Ves. 410; *Mackay, Exp.*, 1 M., D. & De G. 550; see *Taylor, Exp.*, Mont. 240; *Barnett, Exp.*, De G. 194. But so long as the original mortgagor has no notice, his payments on account of this debt to his original mortgagee will discharge him.

(*y*) *Galbraith v. Cooper*, 8 H. L. C. 315.

(*z*) The statute (4 Geo. 2, c. 28, s. 2), which bars lessees where judgment and execution have been suffered in eject-

ment by the landlord for non-payment of rent, unless the rent and costs be paid, or a bill filed in equity within six months after execution, provides that the rights of a mortgagee of the lease who shall not be in possession, shall not be affected, so as he shall, within six calendar months after execution, pay all rent in arrear, and all costs and damages sustained by the lessor or reversioner, and perform all covenants on the part of the first lessee or lessees.

(*a*) 4 & 5 W. & M. c. 16.

upon judgment creditors and mortgagors, under penalty of losing the right of redemption, the obligation of giving notice to *puisné* mortgagees, at the date of their securities, of the prior incumbrance.

Of the Nature of Notice, and the Conditions under which it arises.

894. Notice is either express or implied; the one kind being a question of fact, the other arising from construction of law (*b*).

Actual notice may be verbal as well as written (*c*), and may be effected as well by the delivery of a document which shows the nature and extent of the claim, as by one in the actual form of a notice (*d*). It is not necessary that it should have been given for the purpose of making a transaction valid. If it be actually given the object for which it was given is not material (*e*).

But the notice must be distinct; it is not enough to mention the fact in the course of a general conversation (*f*), and there must be clear evidence of it (*g*), for suspicious circumstances make no notice. It seems, also, that it ought to be given by a person interested in the property (*h*); but probably a notice would be held good, if given even by a self-constituted agent, provided it be in behalf of an interested person, and provided the particulars of the claim be clearly set forth. These conditions are no doubt essential, for "flying reports," says Lord Keeper Egerton (*i*), "are many times fables and not truth." General reputation of a person's insanity in the neighbourhood

(*b*) Co. Litt. 309 b.

(*c*) *Browne v. Savage*, 4 Dr. 635; *North Brit. Ins. Co. v. Hallett*, 7 Jur., N. S. 1263.

(*d*) *Baillie v. McKewan*, 35 Beav. 177.

(*e*) *Smith v. Smith*, 2 Cro. & Mee. 231; and see 1 Hare, 88; *Rickards v. Gledstones*, 8 Jur., N. S. 455; *S. C.*, 3 Gif. 298.

(*f*) 16 Beav. 123; *Edwards v. Martin*, L. R., 1 Eq. 121.

(*g*) *Whitfield v. Fausset*, 1 Ves. 392; *Hine v. Dodd*, 2 Atk. 175; *M'Queen v. Farquhar*, 11 Ves. 482; *West v. Reid*, 2 Hare, 249.

(*h*) Sugd. V. & P. 755, ed. 14.

(*i*) *Gouldsbrough*, 147, pl. 67. *Mr. Coventry* (Pow. Mort. 561 a, C. ed. 6) cites *Butcher v. Stapeley* to the same effect; but it does not appear whether the neighbour's "discourse" was held to be notice or not.

of his residence is, therefore, no notice of such person's insanity, if actual notice be denied (*k*).

895. It is material to the effect of notice, where the object is to preserve priority, that it be given before the entire completion of the transaction. It will be good if given before the execution of the deed, although the money be already paid, because the payment and execution are but parts of the same transaction (*l*); otherwise it will be good before payment, though security have been given for the consideration money (*m*); for, perhaps, after notice it will not be paid. If a cheque be delivered and countermanded, notice before withdrawal of the countermand will bind the purchaser (*n*).

In the case of the bankruptcy of the assignor, the notice, if given before the petition for adjudication of bankruptcy, will be good; though the act of bankruptcy of which the assignee, when he gave the notice, was not aware, had been previously committed (*o*).

896. It is said that notice ought to be in the very transaction which is in question. This was early laid down of that kind of implied or constructive notice, which is founded upon the relation between principal and agent (*p*) (**910**); and it seems to be understood (*q*) to apply generally to the doctrine of notice, whether actual or constructive; subject to the same exceptions which exist in the cases of principal and agent, so far as circumstances allow their application. The general rule has been considered by high authorities (*r*) to be exemplified by the fifth resolution of Lord Keeper Coventry, in the *East Grinstead* case (*s*), where a member of parliament, who had spoken in a debate on a bill to sell charity land, and which

(*k*) *Greenslade v. Dare*, 20 Beav. 284.

(*l*) *Wigg v. Wigg*, 1 Atk. 382.

(*m*) *Hardingham v. Nicholls*, 3 Atk. 304.

(*n*) *Tiddesley v. Lodge*, 3 Sm. & G. 543.

(*o*) See *Bankruptcy Act*, 1869, s. 15 (5); *Styan, Re*, 1 Ph. 105; 2 M., D. &

De G. 219; see *Heslop, Exp.*, 1 De G., M. & G. 477.

(*p*) *Fitzgerald v. Fauconbridge*, Fitzg. 211.

(*q*) Sugd. V. & P. 755, 757, ed. 14; Powell, 586 a, K.

(*r*) Sugd. V. & P. 1041, ed. 11; 755, ed. 14; Powell, 586 a, ed. 6.

(*s*) *Duke's Char. Us* 639.

was thrown out, afterwards bought the land and was held to have no notice of the charitable use; but it is submitted, that no more can be safely inferred from that case, than the dry point, that knowledge acquired in the discharge of parliamentary duties works no notice as to private transactions.

897. Notice operates in a transaction under the direction of the court, just as in any other case (*t*); for the court does not warrant the validity of titles, but only employs its officer to investigate them.

To whom Notice should be given.

898. In considering to whom notice should be given, the question will be (*u*) whether, at the time of lending the money, every person of whom the incumbrancer ought to inquire (and unless he apply to all who have control over the fund, he will not exercise proper caution (*x*)) has sufficient notice. If the circumstances be such, that inquiry would not have led to a knowledge of the prior incumbrance, the notice will not be sufficient. The possession of the legal interest in, or control over the property which is the subject of the security, points out the person to whom the notice should be given. The debtor, therefore where the subject of assignment is a debt; the trustee where it is due from a bankrupt; the official liquidator, where it is due from a company in course of winding up; the insurers where the subject is a policy of insurance; the executor where it is a legacy, and if it be given in trust, then, after the executor has assented to it, the trustees, are the proper recipients of notice (*y*). And if there be more than one set of trustees, notice to the trustee who holds the fund will prevail (*z*). If one of the trustees be himself an executor, notice to the others before his assent will be inoperative (*a*)

(*t*) *Toulmin v. Steere*, 3 Mer. 210.

(*u*) *Smith v. Smith*, 2 Cro. & Mee. 231; *Meux v. Bell*, 1 Hare, 73; *Timson v. Ramsbottom*, 2 Keen, 35.

(*x*) *Smith v. Smith*, *supra*.

(*y*) *Gardner v. Lachlan*, 4 Myl. & Cr. 129; *West v. Reid*, 2 Hare, 249;

Holt v. Dewell, 4 Hare, 446; *M^cTurk, Exp.*, 2 Dea. 58; *Breech-Loading Armoury Co., Re*, L. R., 5 Eq. 284.

(*z*) *Booth, Re*, 21 L. T. 239; *Bridge v. Beadon*, L. R., 3 Eq. 664.

(*a*) *Holt v. Dewell*, *supra*.

against a notice to him by a subsequent incumbrancer, though, where it is fully vested in all the trustees, notice to one is sufficient (*b*), as long as he remains a trustee. In like manner, notice by the assignee of the freight of a ship to the owner's agent, who entered alone into the charter-party as agent, has been held sufficient, without notice to the charterers (*c*); the agent being the only person with whom the contract was made, and to whom the money was payable. And where the ship, which, together with the expected produce of the voyage, formed the subject of the assignment, was at sea, notice was held to have been properly and sufficiently sent to the master (*d*). A mortgagee is, however, not bound to send notice to the master of a ship and cargo at sea (*e*), notice to the consignees being all that can be reasonably expected, and sufficient to preserve his priority if done with due diligence; though he might, perhaps, be overreached, if notice were given to the master while at sea by a later incumbrancer.

899. In the absence of any person having control over a fund consisting of stock, and to whom notice would ordinarily be given,—as if the sole trustee be dead, and there be no legal personal representative,—the incumbrancer should place a *distringas* upon the stock, and by so doing will gain priority over one who has neglected to take the same precaution (*f*). Or, if the fund be in the hands of a trustee who being himself a creditor upon it, cannot complete his title by personal notice, he should take care that it appears on the declaration of trust or other equivalent instrument (*g*). And it is in fact only by means of a *distringas*, of notice on the deed, or of transfer of the fund into court, that the incumbrancer of an equitable interest can be safe, inasmuch as on an appointment of new trustees the notice may fail by non-communication (*h*).

900. Notice to the Paymaster-General, of a charging order

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| (<i>b</i>) <i>Meux v. Bell</i> , 1 Hare, 73. | (<i>f</i>) <i>Etty v. Bridges</i> , 2 Y. & C. C. |
| (<i>c</i>) <i>Gardner v. Lachlan</i> , 4 Myl. & | C. 486. |
| Cr. 129. | (<i>g</i>) <i>Commissioners of Public Works</i> |
| (<i>d</i>) <i>Langton v. Horton</i> , 1 Hare, 549. | <i>v. Harby</i> , 23 Beav. 508. |
| (<i>e</i>) <i>Feltham v. Clark</i> , 1 De G. & S. | (<i>h</i>) <i>Phipps v. Lovegrove</i> , L. R., 16 |
| 307. See <i>Kelsall, Exp.</i> , De G. 352. | Eq. 80. |

upon a fund in court, is useless for the purposes of priority; for though memoranda of such orders are entered in the office of the Paymaster-General, they are not considered to be any restraint upon the fund, and a doubt has been judicially expressed, whether, under such circumstances, it is proper to enter them rather than any other charge (*i*).

901. It seems that notice will be properly given to trustees of a fund which they have paid into court, until the court by dealing with the fund has itself become the trustee (*h*); or so long as anything remains to be done in connection with the fund, wherein the concurrence of the trustee is necessary. Thus where part of an estate had been sold under a decree (*l*), and the produce paid into court, notice of an assignment of a share of the money was given to the trustee for sale, and held sufficient without a stop order; because the sale of the residue of the estate could not be had without the trustee's concurrence. And payment into court under the Trustee Relief Act, does not divest the trustee of his office, so as to render a notice to him ineffectual (*m*). Where the puisné incumbrance was effected upon a fund already in court, and both incumbrancers obtained stop orders on the same day, and so both failed to acquire any priority, a prior notice given by one of them to the trustee was held (*n*) to be effectual.

Where it is determined in a suit, that a trustee is affected by notice of an incumbrance, but no persons are *in esse* who are subjects of the trust, the proper course is not to make a declaration purporting to bind the issue, but merely to declare that the trustee had notice (*o*).

902. The holder of, or other person having any control over, the property concerning which the notice is given, is bound to accept the notice (*p*); and, if he disregard it and part with the fund, may be compelled to make it good to the

(*i*) Warburton v. Hill, Kay, 470.

(*h*) Id.

(*l*) Matthews v. Gabb, 15 Sim. 51.

(*m*) Thompson v. Tomkins, 2 Dr. & Sm. 8.

(*n*) Timson v. Ramsbottom, 2 Keen, 35.

(*o*) Wise v. Wise, 2 Jo. & Lat. 403.

(*p*) Williams v. Thorp, 2 Sim. 257; Hennessy, Re, 2 Dru. & War. 555.

person entitled. The notice also will bind him if properly served upon his agent, though the latter, in compliance with the direction of his principal, have not forwarded the notice to him (*q*). Neither will it make any difference in the case of a company or association, that they have no rules or provisions applicable to the receipt of such notices (*r*), or that they do not require notices to be given of assignments (*s*).

The Merchant Shipping Act, 1854 (*t*), however declares, that no notice of any trust, express, implied, or constructive, shall be entered in the register books of such shipping, or be receivable by the registrar; but this, as explained by the Amendment Act of 1862, does not exclude the existence of equitable interests in ships (72). A similar clause is contained in the Joint Stock Companies Act, 1862, s. 30 (34).

903. A *feme covert* or an infant is just as much bound by notice as an adult (*u*).

Of Constructive Notice.

904. Implied or constructive notice has been defined to be knowledge which the courts impute to a person upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must exist or have been communicated (*x*). It extends to matters affecting the title to property, and to circumstances which would entitle persons to equitable priorities, or change the character of rights which depend upon want of notice, but not to such as merely relate to the motives and objects of the parties, or to the consideration upon which the matter in hand is founded (*y*). It is a presumption adopted for the prevention of fraud, and does not necessarily agree with, but is often contrary to, the probabilities of the particular case. It will not always be raised in opposition to direct proof that no notice really existed (*z*); though in such cases of fraud, as

(*q*) *Hennessy*, Re, 2 Dr. & War. 555.

(*r*) *Williams v. Thorp*, 2 Sim. 257.

(*s*) *Patch*, Exp., 7 Jur. 820.

(*t*) 17 & 18 Vict. c. 104, s. 43.

(*u*) Per Lord St. Leonards, 1 Dru. & War. 166. As to notice under a power of sale binding an infant heir,

see *Tracey v. Lawrence*, 2 Drew. 403.

(*x*) *Hewitt v. Loosemore*, 9 Hare, 449; *Plumbe v. Fluit*, 2 Anst. 432.

(*y*) Per Lord Chelmsford in *Eyre v. Burmester*, 10 H. L. C. 114.

(*z*) See *Earl of Portsmouth v. Lord Effingham*, 1 Ves. 435.

wilful blindness to facts, and neglect to make inquiries, the court will act upon the presumption, notwithstanding such evidence. A person who is proved to have known facts, from which a court or jury or an impartial person would properly draw a certain inference, will therefore not be allowed to escape from notice by saying that he did not draw the natural inference from the facts (*a*).

905. Constructive notice (1.) may be imputed to a person who is guilty of actual fraud, or of negligence amounting to evidence of fraud (**907**), of which a man cannot be allowed to take advantage: (2.) Or it may arise from the relation in which he stands towards others who have notice of certain facts or instruments; and this arises between the principal and his agent (**910**), on a presumption (without which, any man might commit a fraud by means of his agent) that the latter communicates to his principal whatever knowledge he has in the matter that is necessary for the principal's safety: (3.) It also arises from personal knowledge of particular instruments or facts, which, if followed up, would lead to the knowledge imputed (**925**); because it is a presumption of law that a purchaser has investigated the title to the property which he purchases, and has examined whatever forms a link, directly or indirectly, in that title (*b*): (4.) Constructive notice also arises from the presumed publicity of general acts of parliament, and, in certain cases, of judicial proceedings (**955**).

906. In cases of constructive notice the difficulty is usually less where there is actual fraud than where it is to be determined, whether the presumption of knowledge arises by reason of negligence so gross, as to amount in the view of a court of equity to evidence of fraud, or whether it fails because the

(*a*) *Snowball, Exp.*, 1. R., 7 Ch. 534.

(*b*) *Jones v. Smith*, 1 Hare, 43: 1 Ph. 244; *West v. Reid*, 2 Hare, 249; *Butler v. Earl Portarlington*, 1 Dru. & War. 20. But it was held that pur-

chasers for valuable consideration might claim to be without notice under such a settlement as might be made by the apparent owner of the estate, without looking into the deeds. (*Whitfield v. Faussett*, 1 Ves. 392.)

person sought to be charged has shown no more than want of prudence or caution. Where a person has actual notice that the estate with which he is dealing is charged or otherwise affected, it is his duty to inquire into the extent and nature of the charges which affect it, and he will not be justified in assuming that the reference is only to charges which are already known to him (*d*). If he have no actual notice that the estate is affected, and there be no turning away from the knowledge of facts, which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from wilful blindness, is all that can be imputed; there will be no constructive notice, but a purchaser (*e*) will be considered to be such *bond fide* and without notice (*f*).

Of Constructive Notice by Negligence and Fraud.

907. Positive neglect to investigate the title (*g*) of an estate, or to inquire after the deeds (*h*) which are the evidences of title, or the wilful disregard of matters affecting the estate, the nature of which would be immediately disclosed by inquiry, are dealings so obviously tending to fraud that although the omission to inquire does not proceed from fraudulent motives (*i*), the negligent person is held to be affected with all the notice that the fullest inquiry would have brought out as to the title of the person who has possession of the deeds, or who claims an adverse interest in the estate (1409). So a person, who either by his own gross negligence or by omitting to employ a proper agent, fails to discover, or enables another to commit a fraud will, though morally guiltless, be as much affected as if he were the actual contriver (*k*). Thus,

(*d*) *Jones v. Williams*, 24 Beav. 47; 5 Jur., N. S. 1066.

(*e*) It is perhaps hardly necessary to remark that the word "purchaser" applies also to a mortgagee, who is a purchaser *pro tanto*. (1 T. R. 767.)

(*f*) *Jones v. Smith*, 1 Hare, 56.

(*g*) *Worthington v. Morgan*, 16 Sim. 547.

(*h*) *Kennedy v. Green*, 3 Myl. & K.

699; *Jones v. Smith*, 1 Hare, 43; *West v. Reid*, 2 Hare, 249; *Hewitt v. Loosemore*, 9 Hare, 449; *Whitbread v. Jordan*, 1 Y. & C. 303.

(*i*) *Jones v. Williams*, *supra*.

(*k*) *Horns v. Holtom*, 16 Beav. 259; 16 Jur. 1077; *Roddy v. Williams*, 3. Jo. & Lat. 1; see *Hunter v. Walters*, L. R., 11 Eq. 292; *id.* 7 Ch. 75.

where a first mortgagee was induced by his solicitor to assign over without consideration an earlier mortgage, which had been executed but not acted on, he was not allowed to say afterwards that he did not know what he was doing. And where any peculiar circumstance, such as the unusual position of a signature, or manner of engrossing a deed, would put a disinterested professional man upon inquiry, a mortgagee (*l*) cannot set up the defence that he had no professional adviser, or that he employed one, out of the ordinary course, who had an interest in concealing the fraud. But it will be observed that a peculiarity in a deed, which is altogether unconnected with the real defect in the title, will not lead to notice of that defect. Hence, though the absence of a receipt on a conveyance may be notice of a lien for unpaid purchase-money, it has no weight, even when combined with other circumstances, as notice that the grantor was of unsound mind, or that he executed the deed under undue influence (*m*). In like manner, although neglect to inquire for the deeds gives notice of the holder's title, it does not give notice of a fraudulent dealing with the estate committed by the person from whom inquiry should have been made (*n*).

908. The onus lies on a person who claims priority over another, on the ground that he took with notice of an earlier security, to prove that he had such notice; and it is not sufficient for this purpose merely to show that the deeds were in the hands of the earlier incumbrancer, if, under the circumstances of the title, he was the person entitled, irrespective of his security, to the custody of them (*o*).

909. It has been said, that the argument of negligence against negligence, like that of estoppel against estoppel, sets the matter at large (*p*).

(*l*) *Kennedy v. Green*, 3 Myl. & K. 712; *Marjoribanks v. Hovenden*, Dru. 11.

(*m*) *Greenslade v. Dare*, 20 Beav. 284.

(*n*) *Hipkins v. Amery*, 2 Gif. 292; 6 Jur., N. S. 1047.

(*o*) *Hardy, Exp.*, 2 D. & C. 393.

(*p*) Per Sir J. Stuart, V.-C., 18 Jur. 373; Co. Litt. 352 b.; see *Wrouth v. Dawes*, 25 Beav. 380; 4 Jur., N. S. 397; *Withington v. Tate*, L. R., 4 Ch. 288.

the agent who was concerned in the prior transactions may be considered to have forgotten them in the subsequent one, he himself, where he is the subsequent mortgagee, might claim exemption under the same doctrine. In considering this exception as stated above, it will be observed that, though the transactions, in which the notice is acquired and takes effect, are distinct, it is treated as applying only where the principal, or person during whose continuous employment the knowledge is obtained, is the same. And though Lord Eldon appears to have stated (*d*) (extrajudicially) the exception in wider terms, considering the question to be involved, whether one transaction might not follow so closely upon another, as to render it impossible to give a man credit for having forgotten it; and saying he should be unwilling to hold that if an attorney had notice of a transaction in the morning, he should be considered to have forgotten it in the evening; yet it has been since laid down (*e*) that this is not to be taken as implying, that in every case in which, from the short interval between the transactions, the agent must have had knowledge, the principal shall have notice; and that the exception would not be applicable, without the additional circumstance that the solicitor was acting for the same parties.

The employment of the agent must also have been of a responsible kind, and not merely ministerial; as in obtaining the execution of the mortgage deed (*f*).

912. Where the agent has been employed by both parties, one of them may be affected with notice of what the agent knew as agent for the other, before his retainer by the person affected (*g*). Whatever the agent, during his retainer, knows as agent for either party, may possibly in some cases affect both, without reference to the time when the knowledge was first acquired.

(*d*) Mountford v. Scott, 3 Mad. 34; T. & R. 274; and observe that the marginal note to the first of these reports is not borne out by the judgment.

(*e*) Fuller v. Benett, 2 Harc. 394.

(*f*) Wyllie v. Pollen, 32 L. J. (Ch.) 782.

(*g*) Fuller v. Benett, *supra*; Frail v. Ellis, 16 Beav. 350.

913. The following appear to be some of the practical results of these decisions.

1. A mortgagee will not generally be affected with notice of matters touching his security, by reason of knowledge acquired by his counsel, solicitor, or other agent, in a different transaction; or of matters which it was not the duty of the agent to communicate, or material for the principal to know (*h*).

2. Where an agent has been employed both by the same mortgagor, and by several successive mortgagees, in effecting the mortgages, the later mortgagees have notice of the earlier mortgages.

3. As to such of the securities, in which the agent was not employed by both parties, the later mortgagees shall not, by employment of the same agent, be necessarily affected by notice thereof.

4. Yet they may be so affected, if it be shown that at the time of making the later mortgages, the earlier ones were known to, and at the time were actually present to the mind of, the agent. And it seems (*i*), inferentially also, if one transaction so closely followed the other, as to afford an irresistible presumption that the earlier one was so present to his mind.

914. In the cases in which principals have been held affected with notice of facts learned by their agents, in the course of previous transactions, the interval between the different transactions has been small. Six weeks (*h*), seven months (*l*), and a year (*m*), are examples of such periods. In a case (*n*) which has been often referred to, and in which the purchaser of an estate, the vendor whereof agreed after the commencement of the treaty to give his creditor a mortgage upon it, was held bound by the notice of his solicitor, who had been employed about both the sale and the mortgage; five years had indeed

(*h*) *Wyllie v. Pollen*, 32 L. J. (Ch.)
782.

(*i*) See *Gerrard v. O'Reilly*, 3 Dru.
& War. 414.

(*k*) *Winter v. Lord Anson*, 1 Sim.

& St. 434; 8 Russ. 493.

(*l*) *Mountford v. Scott*, 3 Mad. 34.

(*m*) *Hargreaves v. Rothwell*, 1 Keen,
154.

(*n*) *Fuller v. Bennett*, 2 Hare, 304.

clapsed since the treaty was begun; but that case was not determined on the footing that the treaty and the ultimate sale were different transactions, but on the ground that the mortgagee's solicitor had notice of the matter, as solicitor of the mortgagor in the very transaction in which the mortgagee had employed him.

Where a person acted for both parties to a *puisné* mortgage, the knowledge of a prior incumbrance, which it was proved was present to his mind at a certain time, was not imputed two years later, as notice to the subsequent mortgagee (*o*).

915. Notice does not arise between principal and agent, where the transaction effected by the agent is itself founded in fraud, in which the agent is so concerned that it is certain he would conceal it; as where (*p*) a mortgagor by fraudulently obtaining an assignment of the mortgage, effected a new security to another person, acting himself as solicitor to both mortgagees; or again, if (*q*) acting as such solicitor, and knowing of a prior incumbrance, he prepares and procures the owner of the estate to execute a covenant that it is free from incumbrances; this being evidence of deliberate concealment.

916. But if the matter be not fraudulent, apart from the concealment of the fact in question, so that there is room for the presumption of disclosure, upon which the courts act in cases of constructive notice, the mortgagee may be affected by the agent's knowledge. Therefore, where there was a first mortgage by deposit of deeds, and the solicitor who effected it, being also the mortgagor, mortgaged again, acting as solicitor for the new mortgagee, and not disclosing the prior deposit, although it was held that the new mortgagee had no notice of that deposit, because particular evidence

(*o*) *Tylee v. Webb*, 6 Beav. 554, and see *Lloyd v. Attwood*, 3 De G. & J. 614; *Edgecumbe v. Stranger*, 1 Jur. 400.

(*p*) *Kennedy v. Green*, 3 Myl. & K.

712; *Waldy v. Gray*, L. R., 20 Eq. 238.

(*q*) *Thompson v. Cartwright*, 9 Jur., N. S. 940, 1215; 33 Beav. 178; 2 De G. J. & S. 10; 33 L. J. (Ch.) 234.

forbad the presumption of disclosure, it was intimated that the doctrine established in *Kennedy v. Green* did not apply (*r*). The distinction between the cases may be thus stated. In *Kennedy v. Green*, the transaction could not have existed without fraud, or consistently with a knowledge by the mortgagee of the facts. There could, therefore, be no presumption that the fraudulent act was disclosed. In *Hewitt v. Loosemore* the transaction being valid in itself, and its existence not inconsistent with a disclosure of the first mortgage (for the second mortgagee might well have been content to take subject to the first), there was room for a presumption of disclosure, and the ordinary doctrine of notice might apply. The tendency of the judges, however, appears to be to adhere to the broad rule laid down in *Kennedy v. Green*.

In all these cases the burthen of proof is on the client, to show the probability of non-communication of the fact by the solicitor (*s*).

917. Actual retainer of a person as agent seems clearly unnecessary to let in the doctrine of constructive notice; it is even immaterial if the person to be affected knew nothing of the matter until after its completion, if he then acted upon or adopted it; for by doing so, he makes the agent, his agent *ab initio*. Nor is it important that the agent, if he were trusted, was recommended by the very person whose acts are the subjects of the notice (*t*).

918. If the agent be employed in part only of the transaction, notice arises of whatever came to his knowledge during his agency (*u*); at the termination of which the client takes the business with all the knowledge acquired in relation to it.

What might be the result of the mere delivery of papers

(*r*) *Hewitt v. Loosemore*, 9 Hare, 449; 15 Jur. 1099. Also *Atterbury v. Wallis*, 2 Jur., N. S. 1177; 8 De G. M. & G. 454; *Rolland v. Hart*, L. R., 6 Ch. 678; and see *Nixon v. Hamilton*, 2 D. & Wal. 364.

(*s*) *Thompson v. Cartwright*, 33 Beav. 178; 9 Jur., N. S. 940; *S. C.* id. 1215;

2 De G. J. & S. 10.

(*t*) *Jennings v. Moore*, 2 Vern. 609; *S. C.*, *Blenkarne v. Jennens*, 2 Bro. P. C. 278; *Le Neve v. Le Neve*, 3 Atk. 646.

(*u*) *Bury v. Bury*, Sugd. V. & P., App. No. 25, 11th ed.; *Pow. Mort.* 587, 6th ed.; see *Vane v. Lord Barnard*, *Gilb. Eq. R.* 6.

to the agent, that he might enter upon the business, if he never did so, and never inspected them, has been doubted (*x*); and probably could not, *à priori*, be determined.

919. It has been said, that if the mortgagor himself prepare the security (*y*), and no other solicitor be employed, the mortgagor will still be the mortgagee's agent, for he is intrusted with the duties which belong to the mortgagee's solicitor; and it makes no difference that the mortgagee pays him nothing for his services, because it is the nature of the transaction that all the expenses should be borne by the mortgagor. But if the mortgagee employ no solicitor, it will not be assumed, in the absence of evidence, that the mortgagor's solicitor acted for him (*z*). The proposition that the mortgagor, where he is a solicitor, will be assumed to act as the mortgagee's solicitor, is, however, disputed by Lord Chelmsford (*a*), by whom the case is put on the same footing as that in which the mortgagor alone employs a solicitor; who is not to be treated as the mortgagee's agent unless there is evidence of the existence of that relation between them.

920. It is the duty of the giver of the notice to take care that it reaches the person who has the control over the property to be affected by it. And notice ought not to be given only to an agent, who as assignor has an interest in withholding the knowledge of it; nor, *à fortiori*, ought a mortgagee to trust that the principal will have constructive notice, through the agent as assignor. Thus the knowledge which the secretary or agent of a public company has, as mortgagor in his private capacity, of dealings with shares in, or insurances granted by, the company, will not create notice to the company of such dealings (**940**), especially where, in the case of a policy effected by an agent for the purpose of security, there is nothing on the face of the policy to show

(*x*) Pow. Mort. 588, ed. 6.

(*y*) Kennedy v. Green, 3 Myl. & K. 712; Hewitt v. Loosemore, 9 Hare, 449.

(*z*) Atterbury v. Wallis, 2 Jur. N. S. 343. But the L. JJ. decided the case

according to the rule in Hewitt v. Loosemore, 8 De G. M. & G. 454.

(*a*) Espin v. Pemberton, 3 De G. & J. 547.

that he effected it in that character (*b*). But it will be otherwise as to a policy effected through the attorney of the assignee, who is also the agent of the insurance company, where the company has authorized him to receive notices, and has agreed that they shall be as valid as if served on the company at their office (*c*).

921. Where the security consists of shares in a public company or undertaking, if the security be made by the directors and secretary for the purposes of the company, no further notice will be necessary (*d*); if otherwise, notice given to the secretary, official liquidator or other officer who represents the company will bind it (*e*), and the assignee will not be affected by the neglect of the recipient of the notice to make a proper entry (*f*); although a subsequent assignee, who is damnified by the neglect, may have a remedy against the company. Notice to the director of a company is not sufficient; for though it was held, where a director, being also the assignor and an auditor of a company, had notice of the assignment, that no formal notice to the company was necessary (*g*), it has been observed, that such a doctrine might compel a creditor to go half round the kingdom to discover whether notice had been given. And neither an auditor (*h*), director (*i*), or actuary (*j*), are now considered proper recipients of notice to bind the company with which they are connected. Notice to the solicitor of trustees will bind them (*k*).

922. Notice to one of several partners is notice to the partnership (*l*); but in the case of mutual assurance com-

(*b*) *Hennessy*, Re, 2 Dru. & War. 555; *Boulton*, Exp., 1 De G. & J. 163; 3 Jur., N. S. 425; and see *Bartlett v. Bartlett*, 1 De G. & J. 127.

(*c*) *Gale v. Lewis*, 9 Q. B. 730.

(*d*) *Stewart*, Exp., 11 Jur., N. S. 25.

(*e*) *Hennessy*, Re, 2 Dru. & War. 555; *Breech-Loading Armoury Co.*, L. R., 5 Eq. 284; *Alletson v. Chichester*, L. R., 10 C. P. 319.

(*f*) *North British Insurance Co. v. Hallett*, 7 Jur., N. S. 1263.

(*g*) *Waithman*, Exp., 4 Deac. & Ch. 412.

(*h*) *Hennessy*, Re, *supra*.

(*i*) *Burbridge*, Exp., 1 Dea. 142.

(*j*) *Id.*; *Watkins*, Exp., 2 Mont. & Ayr. 348.

(*k*) *Rickards v. Gledstones*, 8 Jur., N. S. 455; 3 Gif. 298.

(*l*) *Travis v. Milne*, 9 Hare, 141; *Worcester Corn Exchange Co.*, Re, 3 De G. M. & G. 180; and cases in next note.

panies, wherein every insurer becomes a partner, his dealing with his own policy will not be considered as a partnership act, affecting the society (*m*) with notice. It has been intimated that notice to a member of a joint-stock banking company, is not, since 1 & 2 Vict. c. 96 (*n*), notice to the company; which is in the nature of a corporation by virtue of the statute, and not of an ordinary copartnership suing jointly (*o*).

923. Notice to the trustee binds the cestui que trust (*p*). If there be several trustees, notice to one of them is generally sufficient, so long as he lives, and the circumstances remain unaltered (*q*), and it is not material in what character the trustee acquired notice, because it is the duty of the mortgagee to apply for information to every trustee. And the mere participation by the trustee in the transaction will work sufficient notice, if the trustee fill the character of assignee; because it is against his interest to conceal it. Where, being the assignor, it is his interest to withhold his knowledge, notice does not arise merely from his participation in the transaction; but if a formal notice be given to him as a trustee, it will be good, notwithstanding his interest in concealing it (*r*). Where there were two sets of trustees, one of an annuity, and the other of a term by which the annuity was secured, notice of a prior incumbrance to one of the trustees of the annuity was held binding (*s*), although the trustees of the term had no notice.

924. If notice of an incumbrance be left at a place of

(*m*) *Thompson v. Speirs*, 13 Sim. 469; *Bromley, Re*, id. 475; *Martin v. Sedgwick*, 9 Beav. 333; *Arkwright, Exp.*, 3 Mont., Dea. & De Gex, 129; notwithstanding *Duncan v. Chamberlayne*, 11 Sim. 123, and *Rose, Exp.*, 2 Mont., Dea. & De Gex, 131.

(*n*) Extended by 3 & 4 Vict. c. 111, and made perpetual by 5 & 6 Vict. c. 85.

(*o*) *Steward v. Dunn*, 12 Mees. & W. 664.

(*p*) *Wise v. Wise*, 2 Jo. & Lat. 403.

(*q*) *Meux v. Bell*, 1 Hare, 73; 6 Jur. 123; *Smith v. Smith*, 2 Cro. & Mcc. 231.

(*r*) *Browne v. Savage*, 4 Dr. 635; *Willes v. Greenhill*, 29 Beav. 376, 387, and 7 Jur., N. S. 1134; 4 De G. M. & G. 147.

(*s*) *Wise v. Wise*, *supra*.

business after business hours, it operates only from the time at which in the ordinary course of business it would be opened and read (*t*).

Of Constructive Notice by Recitals or by Reference.

925. Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall have notice of that fact; for by going from one deed to another, the whole matter would have been discovered, and it is *crassa negligentia* if he sought not after it (*u*). It is, therefore, a rule, that notice of whatever is recited or referred to in an instrument, is effected by notice of the instrument itself (**939**); except, it seems, that in cases of fraud, none but the parties to the deed are affected by constructive notice of the fraud (*v*). Hence notice of a lease is notice of all covenants in it, whether usual or unusual (*x*). And the mortgagee of a lease, wherein was recited the surrender of a former lease, made in consideration of the surrender of a yet earlier one, which showed the fact in question, was held to have notice of the fact (*y*). So a purchaser is bound by judgments affecting the land, and recited in the deeds under which he claims (*z*); and by a mortgage, though not particularly specified (*a*), if the deed, subject to or under which he claims, show the existence of prior mortgages; even where the mortgagee had not taken possession of the deeds. But there is no notice where an express representation is made concerning the deed, which is calculated to mislead, and to disarm inquiry (*b*). And though a deed was expressly made without

(*t*) *Calisher v. Forbes*, L. R., 7 Ch. 109.

(*u*) *Moore v. Bennet*, 2 Ch. Ca. 246.

(*v*) *Read v. Ward*, 7 Vin. Abr. 123.

(*x*) *Taylor v. Stibbert*, 2 Ves. J. 437; *Cosser v. Collinge*, 3 M. & K. 283; *Martin v. Cotter*, 3 J. & L. 497; *Grosvenor v. Green*, 5 Jur., N. S. 117.

(*y*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291; and see *Bisco v. Earl of Banbury*, 1 Ch. Ca. 291; *Davies v. Thomas*, 2 Y. & C. 234.

(*z*) *Hamilton v. Royce*, 2 Sch. & Lef. 315; *Mertins v. Jolliffe*, Anbl. 311; see *Ingram v. Pellham*, where

some of the incumbrances being particularly specified, the purchaser was not bound by those not specified or referred to. (Anbl. 153.) The false recital of a present advance, which is often introduced into mortgages to secure antecedent debts, does not import notice of fraud. Per *Turner, L. J.*, in *Greenfield v. Edwards*, 13 W. R. 668; 2 De G., J. & S. 596.

(*a*) *Eland v. Eland*, 1 Beav. 235; *Farrow v. Rees*, 4 Beav. 18.

(*b*) *Drysdale v. Mace*, 2 Sm. & G. 225; 5 De G., M. & G. 103.

prejudice to the incumbrances affecting the estates, a *puisné* mortgagee was held not to be affected with constructive notice of an equitable assignment of a prior charge, which had been subsequently released by the person legally entitled to it; the release being within the knowledge of the subsequent mortgagee, and it being apparent under the circumstances, that the released charge was not intended to be included among the existing incumbrances (*c*).

Where a widow, tenant for life, married, and represented herself to be, and dealt with the estate as, owner in fee, and conveyed in that character to her husband; on a question between his heir and her appointee under a power executed before her second marriage; it was held (*d*), that the husband was not a purchaser for valuable consideration without notice of his wife's real interest; for he was either negligent in not examining the only deed under which she claimed, or guilty of fraud in taking a conveyance in fee with knowledge of her limited interests. So a broker who insured ships by direction of the owner, knowing that they were mortgaged, was presumed (*e*) to have known also that in the mortgage deed was a covenant to insure the ships; whence, by inquiry of the mortgagees, he might have ascertained that the insurance was made for their benefit, in pursuance of the covenant. And notice that a ship is in mortgage, is enough to put brokers advancing money, upon inquiry whether the mortgage does not include the freight, earnings and profits (*f*).

And so, where the appointees of a tenant for life had notice of a prior mortgage, containing covenants by the appointor not to exercise his power to the mortgagee's prejudice, they were postponed to him, though a reversionary term, not subject to the mortgage term, had been limited to them for their security, and though taking under the interest which created the power, they had an estate which the mortgage did not touch (*g*).

(*c*) *Greenwood v. Churchill*, 6 Beav. 314.

(*d*) *Jackson v. Rowe*, 2 Sim. & St. 472; though a contrary doctrine was formerly held; see *Phillips v. Redhill*,

cited 2 Vern. 160.

(*e*) *Ladbroke v. Lee*, 4 De G. & S. 106.

(*f*) *Gibson v. Ingo*, 6 Hare, 112.

(*g*) *Hurst v. Hurst*, 16 Beav. 372.

926. Nor is the rule under consideration confined to plain recitals of matters of fact. A purchaser will generally be bound by the particulars, and even sometimes by the equities, arising out of an important or peculiar transaction, recited or referred to in a deed or abstract, of which he has notice, and concerning which transaction it becomes his duty to inquire. Thus notice will be imputed of the particulars of a trust, of the existence of which there is actual notice (*h*); of whatever may concern the parties in the execution of a power (*i*), of the revocation or exercise of which there is notice; and of improper dealings with an estate in the professed exercise of a power, where suspicious circumstances are apparent (*k*). And one who has notice of a settlement affecting property which he has agreed to purchase, is bound to inquire if it be supported by an antenuptial agreement (*l*). So the purchasers of under-leases having notice of a lease purporting to be made by husband and wife, under which they claimed, were fixed with notice that her interest was inalienable (*m*). And a person who lent money on the security of a contract for sale was not allowed to tack for want of equal equity with another incumbrancer, of whose charge he had no distinct knowledge; because (*n*) the contract being for a purchase free from incumbrances, he knew that he was dealing with a fund, out of which any incumbrances must be paid.

927. So, if there be anything peculiar in the manner of conveying. A purchaser has notice of a prior title, by the concurrence in his conveyance of persons interested under that title, as of devisees (*o*), where the grantor claims as heir at law; although the deed contain no explanation of their concurrence. But it has been held, that a covenant in a settlement that a minor should execute, was no notice of his interest (*p*). "This might

(*h*) *Malpas v. Ackland*, 3 Russ. 273; Anon., Freem. Ch. 137, pl. 171.

(*i*) *Lord of Banbury's case*, Freem. Ch. 8; and *Lord Crawly's case*, cited there; *Robinson v. Briggs*, 1 Sm. & Gif. 188.

(*k*) *Robinson v. Briggs*, *supra*.

(*l*) *Ferrars v. Cherry*, 2 Vern. 383.

(*m*) *Steedman v. Poole*, 6 Hare, 193.

(*n*) *Lacey v. Ingle*, 2 Ph. 413; see also *Taylor v. Baker*, Dan. 71; 5 Pr. 306.

(*o*) *Burgoyne v. Hutton*, Barn. Ch. 236; and see *A.-G. v. Hall*, 16 Beav. 388.

(*p*) *Hlowarth v. Dean*, 1 Eden, 355.

have had some colour," Lord Northington is reported to have said, in answer to the argument, that inquiry should have been made, "if he had been of maturity, but it was a covenant necessary to make him a party to the settlement. Therefore, I think the circumstance does not prove notice." This distinction seems to be as doubtful, as the reasoning is obscure.

928. A mortgagee has been held affected with notice of an agreement for a prior mortgage, by notice that the mortgagor had not paid for the estate (*q*), the conveyance being also peculiar in form. It has been said, that the inadequacy of the purchase-money, in comparison of the real value of the property, is notice of the existence (*r*) of an incumbrance. And where a lease, being a mere husbandry lease, was made of charity lands, at a small rent, and for a long period, the transaction was held so manifestly bad for the charity, as to bear on the face of it notice of a breach of trust (*s*); with which the purchaser was accordingly fixed.

929. The circumstance, that, upon the renewal of a lease, the lessors are not the same persons who were lessors in the original lease, is one which ought to lead the lessee to inquire into their title, and is sufficient (*t*) to fix him with notice of a trust. It is, however, to be observed with respect to the title to leases, that, although a purchaser is bound to know from whom the lessor derived his title, he is not bound to take notice of all the circumstances under which the title is derived. So that where the infirmity of a lease depends upon matters *dehors* the instrument, the purchaser will not be affected (*u*).

930. A distinction is here to be noted, between notice of instruments, or matters, which must of necessity, and of those which do not of necessity, affect a title. Actual notice of a deed of the first kind is constructive notice (*x*) of its contents,

(*q*) *Frail v. Ellis*, 16 Beav. 350.

(*r*) *Stockdale v. South Sea Co.*, Barn. Ch. 367.

(*s*) *A.-G. v. Pargeter*, 6 Beav. 150; and see *A.-G. v. Pilgrim*, 12 Beav. 57.

(*t*) *A.-G. v. Hall*, 16 Beav. 388.

(*u*) *Id.*; *A.-G. v. Backhouse*, 17 Ves. 283.

(*x*) *Jones v. Smith*, 1 Ph. 253.

and of every thing to which it refers. But notice of a deed of the other kind only requires (*y*) that the person who has it shall act honestly, and shall not be guilty of gross negligence; such a person will not be affected only because he has not done all that a prudent, cautious or wary person would have done, unless it can be said not only that he might, but also that he ought, but for gross negligence, to have ascertained the fact, with notice of which it is sought to affect him.

Hence opinions upon an abstract, or any thing appearing upon a deed, which may possibly leave room for suspicion of what the purchaser cannot know to be, and which may not be true, is not notice which will affect him (*z*). And where an abstract contained a certificate of the redemption of land tax, not by a tenant in fee, but by persons described as trustees and guardians of a minor, and on his behalf, it was held that the purchaser was not bound to inquire how the redemption was wrought out, and was not fixed with notice that the charge had not been extinguished (*a*). The rule, that circumstances which might lead to suspicion only are not notice, also appears by the decision, that an entry in the margin of an insurer's declaration, directing that letters relating to the policy should be sent to a certain solicitor, was no notice (*b*) of the interest of that person's client in the policy, there being nothing to show for whom he acted, or that any change of interest had taken place. It is obvious that such cases as these depend mainly upon their own circumstances, and it has been well observed (*c*) that that which will not affect one man may be abundantly sufficient to affect another.

931. It has been doubted (*d*) whether a purchaser from an heir at law, with notice of a will of the ancestor under whom the heir claimed, would be affected with notice of the contents

(*y*) *Jones v. Smith*, 1 Ph. 254, 257; and see *Finch v. Shaw*, 18 Jur. 935.

(*z*) See *M'Queen v. Farquhar*, 11 Ves. 482; *Whitfield v. Fausset*, 1 Ves. 392. See *Dodds v. Hills*, 2 H. & M. 424.

(*a*) *Ware v. Lord Egmout*, 4 De G. M. & G. 460.

(*b*) *West v. Reid*, 2 Hare, 249; see *Wyatt v. Barwell*, 19 Ves. 440; *Eyre v. Dolphin*, 2 Ba. & Be. 301.

(*c*) *Per Wigram*, V.-C., 1 Hare, 55.

(*d*) *Jones v. Smith*, 1 Hare, 43.

of the will, though in truth he were ignorant of them, and even misled by the heir at the time of the purchase. It has been intimated that such a case would depend upon circumstances. If the testator had been long dead, the heir long in possession, and the purchaser had otherwise credit for good faith, it has been said that a court of equity would not interfere against the legal title, only because the purchaser had notice of the will respecting which he was misled. If the testator's death were recent, other considerations might arise affecting the purchaser with the imputation of fraudulent blindness. It was added, that, if under such circumstances notice of the contents of the will would arise, it would by no means follow that it would be so in the case of a marriage settlement. A will imports a disposition of property, but there is no presumption that a man settles his landed estate on his marriage. It is submitted that it could rarely happen that a mortgagee with notice of a will would be justified in taking from an heir at law without inquiry (*e*). The fact of the heir's being in possession, even for a long period, would probably make little difference. He might be there as tenant for life, or under a lease from the devisee. And it is conceived that an inquiry of, and misrepresentation by, the heir himself, would not save the purchaser if he could have got information elsewhere: for a person who is bound to inquire must use the best means of knowledge which are practically within his reach, and of which a prudent man might be expected to avail himself (*f*).

If he have inquired honestly and with sufficient diligence he may, it is true, be relieved where he has been misled by false information (*g*); but it is conceived, that to ask those only, against whose possible fraud the inquiries are intended to be the safeguard, is in general not sufficient diligence. A person who deals with a mortgagor in a matter which may be affected by the mortgage of which he has notice, will not be excused because he was misled by the mortgagor, if it were in his power

(*e*) And see *Burgoyne v. Hatton*,
Barn. Ch. 236.

(*f*) See *Broadbent v. Barlow*, 7 Jur.,
N. S. 478; 3 De G., F. & J. 570.

(*g*) *Jones v. Smith*, 1 Hare, 43;
1 Phil. 244; *Jones v. Williams*, 24
Beav. 47.

to learn the truth from the mortgagee (*h*). On this principle a *puisné* mortgagee, who was informed by the mortgagor that he had previously given a judgment or warrant of attorney, as a security, to a certain creditor, was held (*i*) to have notice that that security was in truth a mortgage; for the means of better information were within his reach.

932. A person who takes under a deed containing notice of an entail prior to the estate which he claims, must look (*h*) that the entail be spent. It is not enough to deny knowledge of the existence of the heir in tail.

933. The assignment of a term expressly to attend the inheritance is not notice to a mortgagee, any more than where the term is attendant by construction of equity, that there are limitations of the inheritance to be protected by it; but merely that the term is attendant, and that there is an inheritance to be protected. But if the trust be declared to attend the inheritance, as limited by such a deed, or to protect the uses of such a settlement, that is notice of the deed or settlement (*l*).

934. Notice will also arise where the matter depends upon the application of a clear equitable doctrine. Therefore notice of the reservation of an equity of redemption is notice (*m*) of the mortgage title, if the court be of opinion that the equity still subsists. So, where a person having a limited interest in leaseholds, obtained by means of it favourable renewals (*n*),—it being clear that such renewals would be for the benefit of those in remainder (*o*). And he who deals with an agent, who bought from his principal, having knowledge of the fact (*p*); or who purchases a fund, settled in consideration of a covenant

(*h*) See *Ladbroke v. Lee*, 4 De G. & S. 106.

(*i*) *Taylor v. Baker*, Dan. 71; 5 Pr. 306; see *Heathorne v. Darling*, 1 Moore, P. C. 5.

(*k*) *Kelsall v. Bennett*, 1 Atk. 522.

(*l*) Per Lord Hardwicke, 1 T. R. 769.

(*m*) *Hansard v. Hardy*, 18 Ves. 455.

(*n*) *Parker v. Brooke*, 9 Ves. 583.

(*o*) 4 Bac. Abr. 922; *Eyre v. Dolphin*, 2 Ba. & Be. 290; *Bury v. Bury*, Sugd. V. & P., App. 1127, ed. 11.

(*p*) *Molony v. Kernan*, 2 Dru. & War. 31; *Dunbar v. Tredennick*, 2 Ba. & Be. 304.

which remains unperformed (*q*); or who takes a security given by a person who has recently attained majority, for the debt of a near relative, or person standing *in loco parentis* (*r*), is liable to all the equities to which such transactions are subject.

935. But where the construction of a deed is so uncertain, and the equity so doubtful, that the decision of the court cannot be known, a purchaser for valuable consideration, denying actual notice (**970**), will not be affected (*s*). In a case in which a will had been made in a foreign language, and the original was lost, the nicety of the distinction between the words *children* (which was used in the translation) and *issue*, went far to induce the court to hold, that the defendant, a purchaser for valuable consideration, and who had long been in possession, the plaintiff standing by, had no notice; and though two decrees had been made for the plaintiff, the bill was dismissed (*t*).

936. Where the doubt is caused by the fact, that the settlement, of which the purchaser had notice, was not framed according to prior articles, or the rules of equity, in regard to the form of such instruments, it appears (*u*) to be the better opinion, that in cases, at least of modern articles, a mortgagee will now be affected by notice of the equities which arise under them. It has been laid down by Lord St. Leonards (*x*), that if the construction be upon the whole plain, though difficult, and a long period have not elapsed, a purchaser with notice leading to the articles will be bound; but not after a lapse of time, where there is anything so equivocal or ambiguous in them as to render it doubtful how they ought to be carried out. At the end of such a period as half a century,

(*q*) *Harvey v. Ashley*, cited 1 Sch. & Lef. 328; and see *Basevi v. Serra*, 14 Ves. 313.

(*r*) *Maitland v. Backhouse*, 10 Jur. 45; *Archer v. Hudson*, 7 Beav. 551; and 15 L. J. (Ch.) 211.

(*s*) *Parker v. Brooke*, 9 Ves. 588; see *Cordwell v. Mackrill*, Ambl. 515;

Kenney v. Browne, 8 Ridg. P. C. 462, 512.

(*t*) *Bovey v. Smith*, 1 Vern. 144.

(*u*) *Senhouse v. Earle*, Ambl. 285; Sugd. V. & P. 1061, 11th ed.; 781, ed. 14.

(*x*) *Thompson v. Simpson*, 1 Dru. & War. 459.

he said, a purchaser would not be fixed with notice of such an equity. The reader will here observe, that actual notice of a postnuptial settlement, is constructive notice of the ante-nuptial articles upon which it is founded (*y*).

It has also been held, that where, by the rules of equity, one estate has become liable to the burden of incumbrances actually charged upon another, a purchaser, who has notice of the transactions which led to the operation of the rule, will be bound by the incumbrances (*z*). But the decision has more than once (*a*) been disapproved of by Lord St. Leonards, on the ground, that a purchaser is not bound to know all the equities springing out of a particular deed. The doctrine of the cases just cited seems, in some measure, applicable to this point also.

937. A witness, not being considered privy in practice to the contents of a deed, will not be affected with notice thereof, without proof that he knew the contents at the time (*b*), contrary to the earlier doctrine, that every witness, who can write or read, is presumed (*c*) to be acquainted with the substance of the instrument which he undertakes to support by his evidence; in which there is an obvious fallacy, for it is the execution, and not the contents, of the instrument which the witness undertakes to prove.

938. A person will be affected with notice of the contents of an instrument brought to his actual knowledge, though it be inartificially expressed, if the meaning be so plain, that an unprofessional person would not be misled (*d*); perhaps, if it were even less clearly expressed; for, otherwise, a man might avoid notice of the contents of a technically plain docu-

(*y*) *Ferrars v. Cherry*, 2 Vern. 383.

(*z*) *Hamilton v. Royse*, 2 Sch. & Lef. 315.

(*a*) *Averall v. Wade*, Ll. & Geo., temp. Sngd. 252; V. & P. 1057, ed. 11; but see p. 776, ed. 14.

(*b*) *Beckett v. Cordley*, 1 Bro. C. C. 357; *Welford v. Beezely*, 1 Ves. 6; *Colman v. Sarrel*, 1 Ves. jun. 55; Har-

ding *v. Crethorn*, 1 Esp. N. P. 56; *Reed v. Williams*, 5 Taunt. 257; *Biddulph v. St. John*, 2 Sch. & Lef. 532; per Lord Eldon, *Rancliffe v. Parkyns*, 6 Dow 224.

(*c*) *Mocatta v. Margatroyd*, 1 P. W. 392.

(*d*) *Davies v. Davies*, 4 Beav. 54.

ment, in his actual possession, by neglecting to employ a professional adviser.

939. There will be full notice of an incumbrance as against a person who takes subject to it, although in the recital of it, it be inaccurately, or not completely, described; as if the limitations of a will be inaccurately stated, or a settlement be incorrectly referred to as a power of jointuring (*e*); and the more clearly, if the incumbrance be stated as indefinite in amount (*f*); for then the *puisné* mortgagee cannot have been misled to his hurt; but it is not so of an imperfect or erroneous notice given by one person to another of a transaction in which the latter is interested. Hence a notice merely stating an assignment by a certain deed of a reversionary interest is not notice of a covenant in the deed, that insurance premiums, paid by the grantee, should be charged upon the reversion (*g*).

But the matter, of which there is actual notice, must be so connected with that of which notice is to be implied, that an inquiry into the one would naturally lead to knowledge of the other. There will be no notice of matters merely collateral to the subject of inquiry. Therefore, a person affected by recitals in the later deeds, will not, on that account, have notice (*h*), that the original purchase-money remains unpaid; for unless the fact be somewhere recited, or alluded to, an inquiry into the title would not lead to it (**940**).

Nor, for the same reason, will a purchaser from assignees or trustees have notice (*i*) of negligence or other matters amounting to a breach of trust, connected with the manner of selling.

940. He, to whom an instrument is brought for the express

(*e*) *Hope v. Liddell*, 21 Beav. 183; *Bury v. Bury*, Sugd. V. & P. 1127, ed. 11.

(*f*) *Gibson v. Ingo*, 6 Hare, 112.

(*g*) *Bright's Trusts*, Re, 21 Beav. 430; 2 Jur., N. S. 301; and see *Jones v. Smith*, 1 Ph. 244, 253.

(*h*) *Cator v. Pembroke*, 1 Bro. C. C. 301; and on this point it has been said

the case of *Davies v. Thomas*, 2 Y. & C. 234, cannot be supported; see Sugd. V. & P. 879, ed. 11. But note, that in that case, the solicitor of the vendor and purchaser had notice that the money remained partly unpaid; and this solicitor was also a trustee of the settlement made by the purchaser.

(*i*) *Borell v. Dann*, 2 Hare, 440.

purpose of examination in the transaction (*k*), or for whose inspection it is left open for examination in the transaction (*l*), or who is known to have inspected it (*m*), has actual or constructive notice of its contents, though the nature of the contents may have been misrepresented. A shareholder in a public company is not, however, bound to have knowledge of the contents of the company's books, nor is he bound by acquiescence in entries in books which are merely produced at public meetings, and which he might then look at. But directors of the company are affected by notice of whatever it was necessary that they should know of the company's affairs and regulations for the due performance of their duties (*n*) (920).

A person who by himself, or his agents, has searched for judgments (*o*), has notice of any that may have been registered, though it only appear in evidence that searches were made (959).

But the notice will not affect the purchaser, if he afterwards purchase other lands, under a title independent of the instrument of which he had notice, though that instrument may have actually related to them; he being neither presumed to take notice of, nor bound to remember, more than is necessary to make out his title (*p*).

941. Upon principles similar to those which have been already stated, rests the doctrine of constructive notice by the possession of title deeds. A man who deals for an interest in an estate, without obtaining the title deeds, is not necessarily affected with notice of the interest of any one with whom they may have been deposited. It is his business to inquire for them, and if he find that they are not in the possession of the ostensible owner of the estate, he should take reasonable

(*k*) *Cosser v. Collinge*, 6 Myl. & K. 288.

(*l*) *Crofton v. Ormsby*, 2 Sch. & Lef. 583.

(*m*) *Paterson v. Long*, 6 Beav. 599.

(*n*) *York and North Midland Railway Company v. Hudson*, 16 Beav.

500; *Newcastle-upon-Tyne Marine Insurance Co., Re*, 19 Beav. 97.

(*o*) *Procter v. Cooper*, 18 Jur. 444; 2 Drew. 1; 1 Jur., N. S. 149.

(*p*) *Hamilton v. Royse*, 2 Sch. & Lef. 315; and see 2 Harc. 249.

care to satisfy himself as to their position. But it is not the mere fact that the deeds are not forthcoming, nor his want of success in arriving at the truth where he is misled, or want of prudence in carrying his inquiries far enough, so that he be not grossly negligent, or do not wilfully shut his eyes to the truth, that will fix him with notice (*q*) (1408).

Such negligence or wilful blindness will be attributed to a man who makes no investigation (*r*) of the title to an estate, or who knowing (*s*) that the deeds are in deposit, or that the person with whom he deals is indebted, and has given security to another, and that the title deeds are not forthcoming (*t*), abstains from seeking information as to the actual position of the deeds: yet more, if he knows from the situation of the parties, and the custom of their trade, that it is likely that a specific security has been given. So, a mortgagee, who contents himself by examining the court rolls, where he would only find notice of legal incumbrances, shall not be excused (*u*) for neglecting to inquire for the copies of court roll.

942. A person who takes an equitable mortgage on copyholds from an heir at law ought not to be satisfied by the deposit of a copy of his admission only, but should inquire for the admission of his ancestor also (*x*); and will otherwise be fixed with notice of a deposit of that admission.

943. It seems that a person may under peculiar circumstances be without constructive notice of particular documents, which are actually in the custody of himself or his agent; as where they were passed over amongst many title deeds, or were in a box, thought to contain only immaterial writings. But it must of course be sworn positively that

(*q*) *Plumbe v. Fluitt*, 2 Anst. 432; *Evans v. Bicknell*, 6 Ves. 173; *Jones v. Smith*, 1 Hare, 43; 1 Ph. 244; *Finch v. Shaw*, 18 Jur. 935; 19 Beav. 500; 5 H. L. C. 905.

(*r*) *Worthington v. Morgan*, 16 Sim. 547; see *Stein v. Stein*, 16 W. R. 69.

(*s*) *Birch v. Ellames*, 2 Anst. 427; *Hiern v. Mill*, 13 Ves. 114.

(*t*) *Whitbread v. Jordan*, 1 Y. & C. 303.

(*u*) *Id.*

(*x*) *Tylce v. Webb*, 6 Beav. 552.

there was no notice or apprehension of their presence by the person holding them or his agent (*y*).

944. There is nothing in the possession, by a solicitor, of his client's title deeds, which makes inquiry necessary (*z*) on the part of any one dealing for an interest in the estate; such a possession being in the ordinary course of business, is on the contrary so little regarded as evidence of any interest beyond that conferred by the character of solicitor, that a solicitor ought to give notice of any further interest, which he may acquire by contract, to the persons in the visible ownership of the property.

945. Underwriters have notice of the insurance brokers' lien for commission on the policy (*a*).

Of Constructive Notice by Tenancy.

946. Notice also arises from the fact, that a person other than the apparent owner of a corporeal hereditament is in actual occupation or receipt of the rents of the estate; viz. notice to the purchaser (*b*), as between him and the occupier, and also as between him and the owner of whatever interest the latter, or the person from whom he holds, may have acquired in the property; and extending to the actual interest which the occupiers may have as tenants or otherwise or as between themselves; whether that interest be founded upon the contract under which he is in possession, or upon an independent and subsequent contract (*c*). And as the principle of the doctrine is (*d*), that the purchaser is not justified in assuming

(*y*) *Earl of Portsmouth v. Lord Edlingham*, 1 Ves. 435; and *Jacobson's case*, cited there.

(*z*) *Bozon v. Williams*, 3 Y. & J. 150.

(*a*) *Gibson v. Overbury*, 7 Mees. & W. 557.

(*b*) *Taylor v. Stibbert*, 2 Ves. jun. 437; *Daniels v. Davison*, 16 Ves. 249; 17 id. 433; *Powell v. Dillon*, 2 Ba. & Be. 416; *Barnhart v. Greenshields*, 9

Moo. P. C. 18, 32; *Knight v. Bowyer*, 23 Beav. 609; 2 De G. & J. 421; 4 Jur., N. S. 569; *James v. Lichfield*, L. R., 9 Eq. 51; *Holms v. Powell*, 8 De G., M. & G. 572; *Mumford v. Stohwasser*, L. R., 18 Eq. 556.

(*c*) *Allen v. Anthony*, 1 Mer. 282; *Cavander v. Bulteel*, L. R., 9 Ch. 79.

(*d*) *Bailey v. Richardson*, 9 Hare, 734; and see *Crofton v. Ormsby*, 2 Sch. & Lef. 597.

the possession of the occupier to be that of the apparent owner, but is bound to inquire into the nature of his interest, the notice equally arises, whether the property be described to the purchaser as occupied by the person alone who claims the interest in question, or by him and his under tenants (*e*). If, however, the person in possession be not the original lessee, and have no knowledge of the matter contained in the original lease, the purchaser is not bound (*f*) to go further, or to pursue his inquiries through every derivative lessee, until he arrives at the holder of the original lease. Neither does the obligation to inquire extend (*g*) to the interest of the last occupier, where the possession is vacant. Therefore, where property was described as "late in the occupation of A.," the purchaser was held not to have notice, that another person claiming through A. had acquired an interest in the land. And the purchaser will have no notice (*h*) of any interest in the tenant, the existence of which he by his own act has negatived. It was so held, as to the tenant's lien as vendor for part of the purchase-money, the receipt of which he had acknowledged both in the body of the purchase deed, and by an indorsement thereon.

947. It was considered where the agreement, under which the occupier claimed a further interest, did not confer upon him a title in possession, so that he could not on the strength of the agreement have resisted or been relieved against an ejectment, or have rightfully refused to give up possession of the estate, that the purchaser was not affected with notice (*i*). The learned judge by whom this case was decided, appears rather to have aimed at an escape from the case of *Daniels v. Davison* (*h*), of which it has been more than once said, that it

(*e*) *Bailey v. Richardson*, 9 Hare, 734.

(*f*) *Hanbury v. Lichfield*, 2 M. & K. 633.

(*g*) *Miles v. Langley*, 1 R. & M. 39; 2 id. 626.

(*h*) *White v. Wakefield*, 7 Sim. 401.

(*i*) *Penny v. Watts*, 2 De G. & S.

501. This case was not affirmed on appeal; but the doctrine above stated remains untouched by the judgment of the Lord Chancellor, who thought it not proper to be discussed; see 1 Mac. & Gor. 150; 1 H. & Tw. 266.

(*h*) 16 Ves. 249; 17 id. 433.

carries this branch of the doctrine of notice to its fullest extent. It may, however, be difficult to reconcile the decision with the principle upon which that doctrine is said to be founded, viz. (l) that the purchaser may not assume the possession of the tenant to be that of the person who claims to be owner. The principle of the decision in *Penny v. Watts*, makes the question dependent, not upon what the purchaser may properly assume, but upon the nature of the interest which the tenant may chance to possess beyond his mere tenancy.

948. In a case (m) in which prior mortgagees of copyholds, with a covenant to surrender, sought relief against ejectment by a subsequent mortgagee, under an actual surrender, their bill was dismissed, and it was said, that the subsequent mortgagee had no notice of the former covenant. At the date of the later mortgage the mortgagor had been out of possession for thirteen years. The report states also, that the prior mortgagees were in possession, and it does not appear that the question of notice was argued. Now it is clear that if, under the doctrine which we have been considering, an application had been made to the persons in possession, there would have been an immediate disclosure of the prior security.

And it is said to have been held in a modern case (n), that a purchaser for valuable consideration without actual notice, who dealt with a person out of possession, and did not use all the means which a person of due diligence might be expected to use in order to ascertain the state of the title, was to be considered as a purchaser with implied notice.

The report of the case of *Oxwick or Oxwith v. Plumer* in Vernon (o) is very short, but as far as it goes, it tends still more to weaken the conclusion drawn from the report in Bacon. The Lord Chancellor, after stating that there

(l) See *Bailey v. Richardson*, 9 Hare, 734.

(m) *Oxwick v. Plumer*, Bac. Abr. Mortgage, E., s. 3.

(n) *Popple v. Prideaux*, cited arg. 3 Myl. & K. 707.

(o) 2 Vern. 636. See remarks on this case in *Barnhart v. Greenshields*, 9 Moo. P. C. 18.

was no specific agreement for the copyhold, which would alone be a reason for dismissal, is made to say, *possession of the under tenant not sufficient to affect him* (the subsequent mortgage) *with notice*; a doctrine which in ordinary circumstances seems contrary to the modern cases as above stated.

949. A subsequent purchaser will not be affected with notice of non-payment of the purchase-money to the original vendor, only because the title is deduced by recital from him, for the recital does not show the non-payment (*p*). And if the vendor acknowledge the receipt of the whole purchase-money, both in the deed and by an indorsement thereon, no inquiry is necessary whether the payment was in fact made (*q*). Probably such an indorsement alone would have the like effect, but not an acknowledgment in the deed without the indorsement.

Of Constructive Notice in Dealings with Executors, Administrators and Trustees.

950. Although the taking a mortgage from an executor, with knowledge that he fills that character, necessarily implies notice of a will, such a mortgagee is not generally bound to inquire whether the executor is justified in pledging the assets (**417**), nor affected with notice of an improper application of the mortgage money—provided there be no contrivance between the mortgagee and the executor, to the injury of the estate, or the persons entitled under the will; and that the transaction be not obviously one in which the executor is acting in breach of his duty, or which amounts to a *devastavit* (*r*). A person so dealing with an executor does not

(*p*) *Cator v. Pembroke*, 1 Bro. C. C. 301; and see (V. & P. 879, ed. 11) Lord St. Leonard's observations on *Davies v. Thomas*, 1 Y. & C. 234; but observe that there seems to have been other notice in that case (**939**).

(*q*) *White v. Wakefield*, 7 Sim. 401.

(*r*) *Mead v. Lord Orrery*, 3 Atk.

235; *McLeod v. Drummond*, 17 Ves. 152; *Bonney v. Ridgard*, 1 Cox, 145; *Elliott v. Merriman*, 3 Barn. 78; *Scott v. Tyler*, 2 Dick. 712; *Keane v. Roberts*, 4 Mad. 332; and see *Downes v. Power*, 2 Ba. & Be. 498; *Sharshaw v. Gibbs, Kay*, 333—336.

generally become affected by a breach of trust, by taking a mortgage of the assets, whether specifically bequeathed or otherwise; because *primâ facie* the dealing is consistent with the duty of an executor: but not to speak of cases of palpable fraud, such as discounting the executor's private debt out of the consideration money, with notice that a debt of the testator remained unpaid (*s*), the advancement of money to the executor for his private purposes, or in his character of a trader, or in any other manner contrary to the duty or objects of his office, will generally affect the person by whom the money is lent (*t*). And if it appear that the security was made for a debt already due from the executor, and not for a present advance (*u*), the case will be stronger against the mortgagee, because the transaction is *primâ facie* inconsistent with the duty of an executor.

If the executor, upon borrowing the money, represent that part of it is required for executorship purposes, the *onus* of showing how much was required for those purposes is on the borrower; and the court will direct an inquiry as to the amount so applied (*x*) (417).

951. Yet the pledge for the private debt of an executor may be supported, if the executor be himself beneficially interested in the whole or part of the property, and effect the security in terms which indicate an intention to charge his beneficial interest, and not to mortgage in the representative character (*y*). And so it was held, where no express intention to assign the beneficial interest appeared (*z*). And, in another case (*a*), where the assignment was made by three executors, and recited that the money due on the security which was assigned was the proper money of one of the executors for whose benefit the assignment was made. But

(*s*) *Crane v. Drake*, 2 Vern. 616.

(*t*) *Scott v. Tyler*, 2 Dick. 712;
McLeod v. Drummond, 17 Ves. 152.

(*u*) *McLeod v. Drummond*, 14 Ves.
353; *Keane v. Roberts*, 4 Mad. 332;
Watkins v. Cheek, 2 Sim. & St. 199.

(*x*) *Carter v. Sanders*, 2 Drew. 248.

(*y*) *Haynes v. Forshaw*, 11 Hare, 93;
17 Jur. 931; see *Farhall v. Farhall*,
L. R., 7 Ch. 123.

(*z*) *Nugent v. Gifford*, 1 Atk. 463.

(*a*) *Mead v. Lord Orrery*, 3 Atk.
235.

the authority of the last two cases, both of which depended much on special circumstances, has been questioned both by Sir L. Kenyon and by Lord Eldon (*b*).

Where there is a specific legacy of a debt, it seems the executor may settle the account with the debtor without the concurrence of the specific legatee; although Lord Hardwicke was at first inclined to think that the debtor is affected with notice where the legacy is specific (*c*).

If the executor be a specific legatee, and there are no debts outstanding, he may mortgage the legacy to secure his private debt; and an inquiry as to the payment of the testator's debts will not be granted as of course, or unless some ground for it be apparent on the pleadings (*d*).

952. If the mortgagee do not proceed upon the legal authority incident to the character of executor, but upon the faith of his representation, that he is entitled to the property offered as security, he becomes bound (*e*) to inquire into the truth of the representation, and cannot avail himself of the protection given to persons who deal with executors in their representative character.

953. A purchaser from an executor need not, it is said, have any recital of the purpose for which the money is raised (*f*); and is equally protected whether he have an actual assignment or a deposit only (*g*). And the court will not give relief (*h*), after a long acquiescence in the transaction by persons having a sufficient interest to impeach it, on the ground that the circumstances made it proper that the purchaser should have inquired into the necessity for raising the money. The owner of a contingent interest is entitled to

(*b*) 1 Cox, 148; 17 Ves. 164. If the executor be indebted to the estate, the mortgagee will be postponed to the claim of the estate, and is compellable to deliver the deeds to the co-executors. (*Cole v. Muddle*, 10 Hare, 186.)

(*c*) *Langley v. Earl of Oxford*, Ambl. 17.

(*d*) *Taylor v. Hawkins*, 8 Ves. 209.

(*e*) *Hill v. Simpson*, 7 Ves. 152.

(*f*) *Bonney v. Ridgard*, 1 Cox, 145.

(*g*) *Scott v. Tyler*, 2 Dick. 712; *Carter v. Sanders*, 2 Drew. 248. See observations of Mellish, L. J., *British Mutual Investment Co. v. Smart*, L. R., 10 Ch. 578.

(*h*) *Andrew v. Wrigley*, 4 Bro. C. C. 125.

inquire into the payment of the testator's debts, and the application of the assets to them.

Where, the will directing certain property of the testator to be sold, the executors sell to the surviving partners, leaving part of the purchase-money on security, the partners who purchase are protected by the character under which the executors sell, and may plead that they are purchasers for valuable consideration without notice of the trusts of the will (*i*); but the protection does not extend to the surviving partners in a trading concern, in which the testator's trustees, by his direction, leave a part of his assets. In such a case the surviving partners, dealing with the testator's property, with knowledge that it forms part of his estate, are bound to inquire into the trusts upon which it is held, and are fixed with notice of them accordingly (*k*).

954. The same general principles, which govern the dealings of a mortgagee with an executor, apply where the administrator mortgages the estate of his intestate (*l*), and also to cases in which executors or trustees have general power (*m*) to charge the real estate of their testators; but it is otherwise where the money was to be raised for payment of particular debts (*n*).

Of Constructive Notice of Records.

1. Acts of Parliament.

955. Acts of parliament of a private nature are not, as public acts are, notice to bind all the world, even when they are expressly declared to be public acts (*o*).

(*i*) *Chambers v. Howell*, 11 Beav. 6; but see *Hardingham v. Nicholls*, 3 Atk. 304, as to leaving part of the purchase-money on security.

(*k*) *Travis v. Milne*, 9 Hare, 141.

(*l*) *Russell v. Plaise*, 18 Beav. 21; 18 Jur. 254.

(*m*) *Haynes v. Forshaw*, 11 Hare,

93; 17 Jur. 930; *Watkins v. Check*, 2 Sim. & St. 199.

(*n*) *Elliott v. Merriman*, Barn. Ch. 81; *Walker v. Flamstead*, 2 Kenyon, part 2. 57.

(*o*) *Hesse v. Stevenson*, 3 Bos. & Pul. 578; per Lord Hardwicke, 2 Ves. 480.

2. *Court Rolls.*

956. It appears to be now settled, that a purchaser of copyholds is not bound to search the rolls of the manor of which they are held, and the rolls are, in consequence, not of themselves notice of their contents (*p*); though it was formerly held otherwise (*q*).

But it seems that persons who deal with copyhold tenants ought to inform themselves as to the existence of any customs of the manor which may affect their interests; so that a subsequent incumbrancer of copyholds who had searched the rolls was nevertheless bound by a prior incumbrancer not entered thereon (*r*); there being by the custom of the manor no time limited for presenting surrenders made out of court. And it has been held, that persons who contract for a lease, ought to ascertain the custom of the manor as to the length of leases (*s*). We have seen that even searching the roll will not protect a purchaser who neglects to inquire for the copies of court roll (*t*) (**941**).

3. *Registration of Deeds, &c., Lis pendens, Judgments and Decrees.*

957. It is said to have been the original object of registration acts (**45**), that the register should be notice to every body (*u*), and that the order of registration should be the order of priority (*x*); but, with the exception hereafter to be noticed as to priority, a different construction has been put upon them. The register, it is well settled, is not notice to *puisné* incumbrancers (*y*) of earlier registered charges; and much less is it notice to the mortgagor of an assignment of the mortgage (*z*). The reason (*a*) why it is not considered notice is, that if it

(*p*) Bugden v. Bignold, 2 Y. & C. C. C. 377.

(*q*) Pearce v. Newlyn, 3 Mad. 186.

(*r*) Horlock v. Priestly, 2 Sim. 75.

(*s*) Hanbury v. Lichfield, 2 My. & K. 629.

(*t*) Whitbread v. Jordan, 1 Y. & C. 303.

(*u*) Hine v. Dodd, 2 Atk. 275.

(*x*) Ford v. White, 16 Beav. 120.

(*y*) Cator v. Cooley, 1 Cox, 182; Bushell v. Bushell, 1 Sch. & Lef. 90;

Wiseman v. Westland, 1 Y. & J. 117.

(*z*) Williams v. Sorrell, 4 Ves. 389.

(*a*) Bushell v. Bushell, *supra*; Latouche v. Lord Dunsany, 1 Sch. & Lef. 157.

were so, it would be also constructive notice of everything contained in the memorial, and, therefore, of every instrument or fact recited in it; after which the incumbrancer would be bound to inquire. It would also be notice (if such were the fact), that the deed was unduly registered; in which case it would have no preference, and so the provisions of the act for complying with its requisitions would be avoided.

The register is also not of itself notice in Ireland (*b*), although, from the peculiar wording of the Irish act, the effects of registration, as we shall see in considering its bearing upon priorities (1066), is very different. An incumbrancer who has notice of a registered deed is bound by matters contained in the deed, though not noticed in the memorial (*c*).

958. The intention of the registry acts was to protect persons without notice, and not to shelter those whose consciences are already affected by notice *aliunde* (*d*). A person, therefore, who takes with notice of a prior unregistered deed, can gain no preference over it, by registering his own.

959. Against a person who is admitted generally, or proved to have searched the register, either for a deed (*e*) or a judgment (*f*), notice will be presumed of so much of its contents as affects his interests; yet, as he is not bound (*g*) to search, and if he have omitted to do so (unless wilfully to avoid notice), may plead that he is a purchaser for valuable consideration without notice (*h*) (970), he will not be affected by constructive notice of a registered instrument, if it be shown that his search did not extend to that part of the register in which it was contained (*i*).

(*b*) *Bushell v. Bushell*, 1 Sch. & Lef. 103; *Underwood v. Lord Courtown*, 2 Sch. & Lef. 41; *Pentland v. Stokes*, 2 Ba. & Be. 75.

(*c*) *Rochard v. Fulton*, 1 J. & L. 413; 7 Ir. Eq. R. 131.

(*d*) *Le Neve v. Le Neve*, 3 Atk. 646; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Ford v. White*, 16 Beav. 120; *Lee v. Green*, 2 Jur., N. S. 170; 6 De G. M. & G. 155.

(*e*) *Hodgson v. Dean*, 2 Sim. & St. 222; *Ford v. White*, 16 Beav. 120.

(*f*) *Procter v. Cooper*, 2 Drew. 1; and 18 Jur. 444; 1 Jur., N. S. 149.

(*g*) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Lane v. Jackson*, 20 Beav. 535.

(*h*) *Lane v. Jackson*, *supra*.

(*i*) *Hodgson v. Dean*, *supra*.

960. The effect of a *lis pendens* (184) upon the title of a purchaser is analogous to that produced by notice of a title or equity inconsistent with the title of the person from whom he purchases. But the doctrine of *lis pendens* was always common to courts both of law and equity (*j*), and depends not upon the principles of constructive notice, but upon the consideration already mentioned, that no action or suit could be successfully terminated if alienations *pendente lite* were allowed to prevail. But while pending the suit the defendant is thus prevented from affecting by alienation the rights of the plaintiff, and the plaintiff from alienating to the injury of the defendant, where the latter may in the result have a right against him, the rule will not apply to the right of a person who, *pendente lite* and without notice, acquires from a defendant an interest in the litigated property which is affected by the equitable claim of a co-defendant, although the interest appear on the face of the proceedings; provided it be not in question in the suit or a subject of adjudication between the co-defendants; there being generally no decree, and consequently no *lis pendens*, between such parties (*k*). Where such an adjudication was made (*l*) in an administration suit, to which two devisees of separate estates were defendants, by a decree for the sale of one of the estates, without prejudice to the right of the devisee of it to contribution against the other, a mortgagee of the latter estate was held to be affected by the *lis pendens* (*m*).

961. The law as to the notice created by judgments of the superior courts, decrees in equity, rules of courts of common law, and orders in bankruptcy and lunacy, have not been altogether put upon the same footing with *lis pendens*; for, whilst the operation of the latter has been limited, so that whereas it was formerly binding (*n*) of itself, except in cases of collu-

(*j*) So, however, was constructive or implied notice. (Co. Litt. 309 b; Tooker's case, Dyer, 302.)

(*k*) *Bellamy v. Sabine*, 1 De G. & J. 566; 3 Jur., N. S. 943.

(*l*) *Tyler v. Thomas*, 25 Bear. 17.

(*m*) See Judicature Act, 1875, Ord. L.

(*n*) *Tothill*, 45; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Walker v. Smalwood*, Amb. 676; *Self v. Madox*, 1 Vern. 459; *Moore v. McNamara*, 2 Ba. & Be. 186; *Flemming v. Page*, Finch, 320.

sion (*o*), it now binds no purchaser or mortgagee without express notice of it, unless it be duly registered (*p*); decrees (*q*) and judgments (*r*), which (although docketed (*s*)), were (*t*) not formerly notice of themselves, but though not docketed, affected a purchaser having express notice, now require registration to make them effectual (*u*), even where there is express notice (*v*) of them *aliunde*; but are still not made notice by force of the register, and are in fact not notice unless it be shown that the register was searched (*x*).

Lis pendens, then, is still of itself binding, if duly registered; and, whether registered or not, a purchaser is affected by express notice of it. But judgments and decrees are not notice of themselves, although registered; yet, unless they be registered, a purchaser is not affected even by express notice of them.

962. It is laid down (*y*), that where a man is to be affected by *lis pendens*, there ought to be a close and continued prosecution of the suit; or, as has been said, something should be done to keep it alive, and in activity (*z*). And as a registered *lis pendens* could not be vacated without the consent of the person by whom it was registered, which consent was sometimes withheld, it has been enacted that the court before which the property sought to be bound is in litigation, may, upon the determination, or during the pendency of the litigation, when it

(*o*) *Culpeper v. Aston*, 2 Ch. Ca. 115.

(*p*) 2 & 3 Vict. c. 11, s. 7.

(*q*) *Tothill*, 45; *Worsley v. Earl of Scarborough*, *supra*; *Rivers v. Steele*, Mr. Cox's MS., 1 Vern. 286, Line. Inn Lib.; notwithstanding *Sorrell v. Carpenter*, 2 P.W. 482; *Searle v. Lane*, 2 Vern. 37 and 88; and other early cases; and see Sugd. V. & P. 760, ed. 14; see also *Giffard's case*, Freem. Ch. App. 310, ed. 2; and as to express notice, *Harvey v. Montague*, 1 Vern. 57 and 122.

(*r*) *Churchill v. Grove*, Nels. 89;

Snelling v. Squibb, 2 Ch. Ca. 47; *Greswold v. Marsham*, *id.* 171.

(*s*) 2 Eq. Ca. Abr. 682, D. d.

(*t*) *Davis v. Strathmore*, 16 Ves. 419.

(*u*) 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 4.

(*v*) 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, s. 4.

(*w*) *Procter v. Cooper*, 2 Drew. 1; 18 Jur. 444; 2 Jur., N. S. 149; 2 & 3 Vict. c. 11, s. 5.

(*y*) *Bishop of Winchester v. Paine*, 11 Ves. 200; *Beames, Ord.* 7; *Preston v. Tubbin*, 1 Vern. 286.

(*z*) *Kinsman v. Kinsman*, 1 Russ. & Myl. 622.

shall be satisfied that the litigation is not prosecuted *bonâ fide*, order the registration to be vacated without the consent of the party who registered it, and may in the discretion of the court direct the party on whose behalf the registration was made, to pay all the costs and expenses occasioned by the registration or the vacating thereof (*a*).

963. The effect of *lis pendens* extends to any interest directly in question in the suit. It therefore binds the assignee of an equity of redemption, assigned during the suit; and the purchaser from an heir at law, pending a suit to establish the will of an ancestor, as well as the assignee of the alleged devisees (*b*). And the assignee is as much affected where the contract was entered into before the commencement of the suit, as where it was both entered into and completed after that period (*c*).

But it merely binds as to the claim which is the subject of the suit, and does not of itself create an incumbrance where the claim being invalid could create none (*d*). Nor will it, either in the case of real or personal estate, stop trustees or executors from carrying out their trusts (*e*). A suit, therefore, for a general account of personal, or of real and personal estate, both consisting of various parts, where there is no dispute about the title, and no receiver has been appointed, nor injunction granted to restrain dealing with the property, will not affect the title of a purchaser from a devisee or executor. But in the case of a suit, charging a particular estate with a particular trust, it is otherwise (*f*). And where the life estate of an executor, in lands subject to a judgment, was liable in equity to recoup assets of the testator, which by the executor's default had become applicable to discharge the judgment, it was held (*g*), that a suit by the judgment creditor for an account of the testa-

(*a*) 30 & 31 Vict. c. 47, s. 2.

(*b*) Garth v. Ward, 2 Atk. 174.

(*c*) Norris v. Lord Dudley Stuart,
16 Beav. 359.

(*d*) Bull v. Hutchens, 32 Beav. 615;
9 Jur., N. S. 954. ♦

(*e*) Walker v. Flamstead, 2 Kenyon,

part 2, 57; Berry v. Gibbons, L. R.,
8 Ch. 747.

(*f*) Walker v. Flamstead, *supra*.

(*g*) Jennings v. Bond, 2 Jo. & Lat.
720. See Drew v. Earl of Norbury,
3 Id. 267.

tor's real and personal estate and payment of his debts, did affect a mortgagee of the executor *pendente lite*; the security not being a step taken in execution of the trust.

964. *Lis pendens* does not apply to any fact, or equity arising out of a fact, which is not asserted in or does not appear by the suit. So that a suit(*h*) to carry out the trusts of a deed by which a legacy passed by general assignment, but wherein no specific claim is made to the legacy, is not notice of the assignment. So, where the matter, though connected with, is merely collateral to the question in the cause. Therefore, if the cause relate to a right to money, which is secured upon an estate, but not to the estate itself, a purchaser of the estate pending that suit is not affected (*i*).

965. It was stated above that a decree was no notice of itself; but this applies only to decrees which put an end to the *litis contestatio*. A decree which is not final, as a decree to account which puts no end to the matters in question, binds(*h*), as *lis pendens*. And it was held, that where, after a decree to account, a report had been made and confirmed, all the equities adjusted, and every thing obtained under the decree, which had been contemplated in the suit, and upwards of a quarter of a century had elapsed since the decree, though no general decree had been made on further directions, a purchaser was not (*l*) affected by a continuing *lis pendens*,—the *litis contestatio* necessary to constitute *litis pendencia* being substantially at an end.

The opinion of Lord Redesdale (*m*), that a transaction done after the dismissal of a bill, is still *pendente lite*, because it may still be a question on appeal to the lords whether the bill was

(*h*) *Houlditch v. Wallace*, 5 Cl. & Fin. 629; *Holt v. Dewell*, 4 Hare, 446. And in general a suit which cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser claiming under one of the parties after filing the bill. Per Lord Hardwicke, Barn. Ch. R. 454.

(*i*) *Worsley v. Earl of Scarborough*, 3 Atk. 392.

(*k*) *Id.*; *Higgins v. Shaw*, 2 Dru. & War. 356.

(*l*) *Kinsman v. Kinsman*, 1 Russ. & Myl. 617.

(*m*) *Gore v. Staepoole*, 1 Dow, 31.

rightly dismissed, and that the parties, therefore, take subject to all the legal and equitable consequences of the transaction, is dissented from, by Lord St. Leonards (*n*), as too great an extension of the doctrine. It may be observed, with respect to appeals from the court below, either to a superior jurisdiction there or to the House of Lords, that an order for an appeal seems not to be a continuation of the *lis pendens*, because, as a general rule, the appeal puts no stop to the proceedings under the decree (*o*). The *litis contestatio* is assumed to be at an end, until the decree is varied or reversed. And the same practice prevails in the House of Lords (*p*), which seems to be a strong argument against the continuation of the *lis pendens* during the appeal. Of course, if the registration be allowed to drop during the period allowed for appeal, the question will not arise.

966. A purchaser for valuable consideration will not be affected by a suit by one claiming under a voluntary settlement by the same owner, praying an execution of the trusts of the settlement (*q*). Neither will *lis pendens* affect any particular person with a fraud (*r*), unless there were special notice of the title in dispute to that person. Nor will it postpone a registered conveyance (*s*); actual notice, clearly proved, being alone sufficient for that purpose. Where the question arises on a claim by a purchaser *pendente lite* to be relieved against the effect of the suit, the registration of the deed of the person sought to be affected by the *lis pendens* gives no advantage (*t*). It is presumed that the effect of *lis pendens* has not been changed in these respects by the statute.

967. *Lis pendens* formerly took effect when the bill was filed by relation from the service of the subpoena (*u*). It is considered

(*n*) V. & P. 758, ed. 14.

(*o*) Cons. Ord. xxxi. 2.

(*p*) House of Lords' Journals, 46, 439.
p. 338; 47 Geo. 3; and see 16 Ves.
213.

(*q*) Metcalfe v. Pulvertoft, 1 V. &
B. 180.

(*r*) Per Lord Hardwicke, 3 Atk. 243.

(*s*) Per Sir William Grant, 19 Ves.

(*t*) Jennings v. Bond, 2 Jo. & Lat.
720.

(*u*) Anon., 1 Vern. 318.

that it will now take effect from the service of the writ, when the action has been registered under the statute.

968. Against a *bonâ fide* purchaser for full value and without actual notice, the effect of *lis pendens* has been thought so hard that no help was given to the plaintiff to cure defects in the proof of his title (*x*).

969. An act of bankruptcy is not of itself notice (*y*).

Of the Plea of Purchase without Notice.

970. It appears to be now well settled, after great difference of opinion, that the plea of purchase for valuable consideration without notice may be set up as well by one who has but an equitable as by one who has a legal title (*z*); the principle of the plea being simply that it is contrary to equity to disturb the title of one, who has honestly and *bonâ fide* paid his money for the purchase of any estate or interest (**1031**).

It seems to have been hinted by Lord Cottenham (*a*), that there might be a difference between cases in which the person setting up the defence had only contracted for an equitable title, and those in which the grantor assumed that he was in possession of, and purported to convey, the legal title (*b*). But

(*x*) *Sorrell v. Carpenter*, 2 P. Wms. 482.

(*y*) *Wilkes v. Bodington*, 1 Vern. 599. The provision in the Act of 1849 (s. 87), that notice to the accredited agent of a body corporate or public company of an act of bankruptcy should be notice to the body or company, is omitted in the Act of 1869. If the agent was undoubtedly accredited, it was unnecessary, and the act did not and could not show under what circumstances an agent was to be considered as accredited.

(*z*) *Burlace v. Cook*, Freem. Ch. 24, plaintiff being heir-at-law with *primâ facie* legal title (1677); *Jerrard v. Saunders*, 2 Ves. jun. 454 (1794); *Wallwyn v. Lee*, 9 Ves. 21 (1803);

Payne v. Compton, 2 Y. & C. 457 (1837); *Bowen v. Evans*, 1 Jo. & Lat. 178, 264 (1844); *Joyce v. De Moleyns*, 2 id. 374 (1845); *Penny v. Watts*, 2 De G. & S. 501 (1848); S. C. 1 Mac. & G. 150; 1 H. & Tw. 266; A.-G. v. Wilkins, 17 Beav. 285; 17 Jur. 885 (1853); *Lane v. Jackson*, 20 Beav. 535 (1855); and see *Parker v. Blythmore*, 2 Eq. Ca. Abr. 79, pl. 1; *Meynell v. Garraway*, Nels. Ch. 63; *Finch v. Shaw*, and *Colyer v. Finch*, 18 Jur. 935; 3 id., N. S. 25; 5 H. L. C. 905; *Hunter v. Walters*, L. R., 11 Eq. 292; 7 Ch. 75; *Heath v. Crenlock*, 10 Ch. 22.

(*a*) See *Frazer v. Jones*, 17 L. J. (Ch.), N. S. 353.

(*b*) See *Wallwyn v. Lee*, 9 Ves. 21

the principle of the doctrine depends rather upon the *bona fides* of the mortgagee or other purchaser, and the payment of his money without notice, than upon the nature of the interest purchased (*c*). The benefit of the defence has been denied to a person who paid his money to the alleged agent of the apparent owner without his authority, the apparent owner being a mere grantee under a fraudulent deed, and never having been in possession (*d*).

971. Although the title of the *bonâ fide* purchaser for valuable consideration without notice is so far respected that no active relief will be given against him, yet where the property is not actually in his possession, but *in medio*, as, for instance, if a fund which is the subject of dispute be paid into court, a declaration of priority may be made, under which an adverse claimant may get the fruits of a better equitable title (*e*); and a person in possession of the legal title was not restrained from proceeding at law against the equitable owner (*f*).

972. A person, whose equitable title is valid against the mortgagor only, cannot use this defence against a prior incumbrancer. Such is the position of a solicitor with whom his client, after disposing of the estate, has deposited the title deeds (*g*); for he takes them subject to the rights of the purchaser or mortgagee.

Nor does this doctrine prevent the enforcement of equitable rights incidental to a clear and absolute legal title, as against a

(*c*) The principal authorities for the doctrine that the plea bars only an equitable claim, are *Williams v. Lamb*, 3 Bro. C. C. 264 (1791); *Rogers v. Seale*, Freem. Ch. 84; but its authenticity is denied by Lord Rosslyn (2 Ves. jun. 457), as contrary to Lord Nottingham's own decision in *Burlace v. Cook*, *supra*, and to his doctrine that the court has no jurisdiction against a purchaser for valuable consideration; *Collins v. Archer*, 1 R. & M. 284 (1830); see also 5 Price, 306.

(*d*) *Ogilvie v. Jeaffreson*, 2 Gif. 353. 6 Jur., N. S. 970; see *Newton v. Newton*, L. R., 6 Eq. 135; 4 Ch. 143.

(*e*) *Stuckhouse v. Jersey*, 1 J. & II. 721; 7 Jur., N. S. 359; notwithstanding *Joyce v. De Moleyns*, *supra*.

(*f*) *Bowen v. Evans*, 1 Jo. & Lat. 178, 264; *A.-G. v. Wilkins*, 17 Beav. 285.

(*g*) *Smith v. Chichester*, 2 D. & War. 393, overruling *Bernard v. Drought*, 1 Mol. 38.

subsequent purchaser of an equitable interest; the principle being only to refuse equitable assistance to persons who are seeking to enforce a legal claim, and [depending upon] the establishment of a legal right. Therefore a prior legal mortgagee is entitled to a decree of foreclosure against a subsequent purchaser from the mortgagor, without notice of the prior mortgage (*h*).

973. It was formerly not necessary to charge particular facts as evidence of notice, or to charge notice, in a suit in which purchase for valuable consideration without notice might be pleaded (*i*). And a simple allegation of notice was sufficient to let in proof of the particular circumstances which constituted the notice (*k*). But in suits in which replication was filed, an inquiry was directed if the defendant was surprised by evidence of particular notice not alleged in the bill (*l*).

974. Where the notice is verbal, it will be left to the jury to form an opinion as to its sufficiency; and this was done, even where it was sworn to be the practice of the company, to whose agent the notice was given, to require and record written, but to make no entries of verbal, notices (*m*).

The date at which notice was given may be a material question even to the fraction of a day; hence a reference has been directed, to ascertain the relative times at which, on the same day, a notice was given and an act of bankruptcy committed (*n*).

975. Notice must be denied though it be not charged (*o*),

(*h*) *Finch v. Shaw*, 19 Beav. 500; *Colyer v. Finch*, 5 H. L. C. 905; 18 Jur. 935; 3 *id.*, N. S. 25; *Heath v. Crealock*, L. R., 10 Ch. 22; *Waldy v. Gray*, *id.*, 20 Eq. 238.

(*i*) *Hughes v. Garner*, 2 Y. & C. 329.

(*k*) *Id.*; *Clark v. Wilmot*, 1 Y. & C. C. C. 53.

(*l*) *Weston v. Empire Assurance Corporation*, L. R., 6 Eq. 23. See *Hardy*

v. Reeves, 5 Ves. 426, and *Judicature Act*, 1875, Sched. Ord. XIX. (18).

(*m*) *Edwards v. Scott*, 2 *Scott's N. R.* 266.

(*n*) *Bignold, Exp.*, 3 *Mont. & Ayr.* 9; *Richardson, Exp.*, 3 *Dea* 496; *Mont. & C.* 43.

(*o*) *Aston v. Curzon*, *Hil. T.* 1719; *Weston v. Berkeley*, *July*, 1729, cited 3 *P. W.* 244, note.

for the denial ought to appear on the pleadings, that there may be an opportunity of proving it. The general denial of all notice whatever, includes constructive as well as actual notice, and therefore amounts to a denial of notice by means of a particular deed, upon which the plaintiff states his claim to be founded.

976. The denial of notice must be positive and not evasive (*p*). Denial of notice upon executing the deed (*q*), or at the time of purchase (*r*), or in any manner which does not exclude notice before the completion of the transaction, will not hold good. It should be averred distinctly that there was no notice either at or before the execution of the deed, or payment of the consideration money (*s*).

The denial must also be as special as the charge (*t*), not general, in answer to a charge of particular notice, nor oblique, or by way of negative pregnant. It is, therefore, not sufficient for a person, in answer to a charge of particular facts, to plead that to his knowledge and belief there was no notice (*u*), for then he makes himself the judge of that which the court ought to decide, viz. whether the circumstances amount to notice; neither is it sufficient, if one charged to be affected with notice, deny merely that he had notice, for this is a negative pregnant, implying notice to his agent (*x*); nor to deny notice that a person was *in esse*, who could claim under a prior title, such as an estate tail; he should deny notice of the title (*y*), for if he had notice of it, he was bound to see whether it was spent.

977. The evidence of a single witness will not suffice to establish notice, either actual or constructive, against a positive, plain and precise denial by answer, where the credit is equal;

(*p*) 2 Eq. Ca. Abr. 682, D., MS. note.

(*q*) Birch v. Ellames, 2 Anst. 427.

(*r*) More v. Mayhow, Freem. Ch. 175.

(*s*) Jones v. Thomas, 3 P. W. 243; Fitzgerald v. Burk, 2 Atk. 397; Story v. Lord Windsor, id. 630; Hardingham

v. Nicholls, 3 id. 304; Tenison v. Sweeny, 1 J. & L. 710; but see Chambers v. Howell, 11 Beav. 6.

(*t*) Radford v. Wilson, 3 Atk. 815.

(*u*) Jerrard v. Saunders, 2 Ves. jun. 187.

(*x*) Le Neve v. Le Neve, 3 Atk. 646.

(*y*) Kelsall v. Bennet, 1 Atk. 522.

but the question of credit may make an exception to the rule; and, in considering this, it is necessary, says Lord Eldon, to abstract from the mind, as far as possible, the consideration that the evidence on one side may be biassed by interest (*z*).

No weight will be given to an objection that it does not appear when a document considered to give notice to a person came into his custody (*a*); for if a person admit that a deed is in his custody, whether as representative or otherwise, it is incumbent on him to show when it came there.

978. Lastly, as a purchaser who desires to insist upon the equity of payment without notice, must distinctly plead it (*b*), so he will also be held strictly to proof of the payment (*c*), and the cause will not be allowed to stand over that he may obtain such proof. And in pleading payment he ought to show the particulars of the payment (*d*), and must plead it distinctly and separately, and not by way of recital of the deed (*e*).

(*z*) Howarth *v.* Deem, 1 Eden, 351;
Bury *v.* Bury, Sugd. V. & P. App.
1128, ed. 11; Janson *v.* Rany, 2 Atk.
140; Only *v.* Walker, 3 Atk. 407; 6
Ves. 184; 9 Ves. 283.

(*a*) Earl Pomfret *v.* Windsor, 2 Ves.
485.

(*b*) Phillips *v.* Phillips, 3 Gif. 200;

4 De G. F. & J. 208; 7 Jur., N.S. 1094;
8 id. 145.

(*c*) Molony *v.* Kernau, 2 Dru. &
War. 31.

(*d*) Cantrell *v.* Mannington, Finch,
219.

(*e*) Maitland *v.* Wilson, 3 Atk. 814.

LONDON :
PRINTED BY C. ROWORTH AND SONS, 16, NEWTON STREET,
HIGH HOLBORN,

